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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x
4 UNITED STATES OF AMERICA,

New York, N.Y.

5 v.

6 14 Cr. 534 (JSR)

7 HARVEY NEWKIRK,

8 Defendant.
9 -----x

10 August 21, 2015
11 4:15 p.m.

12 Before:

13 HON. JED S. RAKOFF,

14 District Judge

15 APPEARANCES

16 PREET BHARARA

17 United States Attorney for the
18 Southern District of New York

19 BY: ANDREW C. ADAMS
20 SARAH PAUL
21 Assistant United States Attorneys

22 LAW OFFICES OF PRIYA CHAUDHRY

23 Attorney for Defendant

24 BY: PRIYA CHAUDHRY

25 HARRIS, O'BRIEN, ST. LAURENT & CHAUDHRY

Attorneys for Defendant

BY: JAMES KENEALLY

ALSO PRESENT:

CHLOE MARMET, Paralegal, U.S. Attorney's Office

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP

Attorneys for Bryan Cave, LLP

BY: MOSES SILVERMAN

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1 (Case called)

2 MR. ADAMS: Good afternoon, your Honor. Andrew Adams
3 and Sarah Paul for the United States. With us at counsel table
4 is paralegal Chloe Marmet.

5 THE COURT: Good afternoon.

6 MS. PAUL: Good afternoon, your Honor.

7 MS. CHAUDHRY: Good afternoon, your Honor. Priya
8 Chaudhry and James Keneally for Harvey Newkirk, who is present
9 standing between us.

10 THE COURT: Good afternoon.

11 MR. SILVERMAN: Good afternoon, your Honor. Moses
12 Silverman, from Paul, Weiss, Rifkind, Wharton & Garrison. We
13 represent Bryan Cave, LLP, and I believe your Honor asked that
14 an attorney for Bryan Cave be here.15 THE COURT: Yes. Why don't you take a seat at one of
16 the tables up here. We will not construe which side you
17 take --

18 MR. SILVERMAN: I don't know which one to pick.

19 THE COURT: If you want, you can take the jury box.
20 We also will at some point want to get on the phone
21 Ms. Buchanan. Do we have a phone number for her.22 MR. ADAMS: Yes, your Honor. I have two. My
23 understanding is we need to call one first, and then she will
24 move to a second one after that.

25 THE COURT: I think what we should do is just call her

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1 now and tell her we will call her back when we reach the point
2 in the proceeding where we want her testimony.

3 MR. ADAMS: Certainly, your Honor. I can pass up the
4 phone number.

5 THE COURT: If there are any witnesses other than the
6 defendant, they should go into the witness room at this time.

7 MR. ADAMS: Certainly, your Honor.

8 (Pause)

9 THE COURT: There are two motions before the court,
10 and though they are interrelated, the one I want to first deal
11 with is the motion that asks for various forms of relief based
12 on an alleged attorney/client relationship between Mr. Newkirk
13 and Bryan Cave.

14 Mr. Newkirk bears the burden on that, so let's put him
15 on the stand first.

16 MS. CHAUDHRY: I think, your Honor, before we begin,
17 if I can just clarify one thing. The government has not given
18 us a witness list, but they have given us 3500 material that
19 causes me to believe that they will be calling both agents. I
20 had confirmed and asked the government to let me know that the
21 agents would be here and available. Because it is my belief
22 that they are calling the witnesses, I don't plan to call them;
23 but if they are not, I would like to be told so that I can call
24 them. I don't want to waive my option of having them testify.

25 THE COURT: All right.

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1 So let's get Mr. Newkirk on the stand.

2 HARVEY NEWKIRK,

3 the defendant, having been duly sworn, testified as
4 follows:

5 THE COURT: Mr. Newkirk, you went to Columbia Law
6 School and graduated in 2001, is that right?

7 THE WITNESS: Yes, your Honor.

8 THE COURT: So you had some familiarity, even from law
9 school, as to the attorney/client privilege, yes?

10 THE WITNESS: Yes, your Honor.

11 THE COURT: And you then worked with a number of large
12 firms here in New York, yes?

13 THE WITNESS: Correct.

14 THE COURT: So on or about February 12, 2014, a
15 partner at Bryan Cave, where you were at the time, named Jay
16 Dorman, called you and asked you to go to a conference room, is
17 that it?

18 THE WITNESS: I left the office for the day, so he
19 called and asked me to come back to the office.

20 THE COURT: What time of day was this approximately?

21 THE WITNESS: Probably between 5 and 5:30, 5 and 6.

22 THE COURT: What level were you at at the time?

23 THE WITNESS: Counsel.

24 THE COURT: So you went to the conference room and who
25 was there?

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1 THE WITNESS: At the time I didn't know him, but he
2 introduced himself as Austin Campriello. He is a partner at
3 the firm. And then there was Agent Deal and Agent Hilliard
4 seated inside the conference room.

5 THE COURT: Did Mr. Campriello or anyone else from the
6 firm say anything to you before you entered the room?

7 THE WITNESS: No.

8 THE COURT: What occurred after you entered the room?

9 THE WITNESS: Mr. Campriello introduced himself to me.
10 We walked to the corner of the conference room so that we were
11 approximately 10 to 15 feet from where the agents were. He
12 told me that the agents wanted to speak to me regarding the
13 Maxim transaction; that he wouldn't be sitting in; that Mary
14 Beth Buchanan would be sitting in and she was on her way; and
15 then he told me -- he said that I may not have remembered him,
16 but that he was a white collar defense attorney.

17 THE COURT: And what happened next?

18 THE WITNESS: There was a little bit of small talk for
19 less than a minute with Mr. Campriello, then we sat down and
20 the agents told us that they had arrested Darden, Jr.

21 THE COURT: Stopping the music right at that point,
22 you had been told that Ms. Buchanan would be sitting in. Did
23 you have any reason to believe that she was acting as your
24 personal lawyer?

25 THE WITNESS: Yes, your Honor.

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1 THE COURT: What?

2 THE WITNESS: Because for the previous -- since we
3 were made aware that an investigation was ongoing, the firm had
4 been in a hunker-down mode regarding potential civil
5 litigation, so there were a number of interviews and
6 conversations that I had with different people at the firm, and
7 I felt that we had a joint interest because our interests were
8 aligned as far as potential civil litigation.

9 THE COURT: These were conversations prior to February
10 12?

11 THE WITNESS: Correct; prior to and after, but yes.

12 THE COURT: After I am not yet concerned with.

13 What conversations did you have prior to this time
14 regarding a government investigation?

15 THE WITNESS: Sometime in -- well, there were two.
16 First, when we notified Citibank that there was a potential
17 fraud with the wire, Citibank notified us that they were going
18 to notify the Secret Service, as they are required to by law.

19 At that point Mr. Alfieri, who ran part of the office,
20 or shortly thereafter had mentioned that there was an
21 investigation started. And then sometime in November or
22 December, I was contacted by Agent Deal.

23 THE COURT: Take it one at a time.

24 In the first conversation you just said, where
25 Citibank told you there was an investigation --

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1 THE WITNESS: They said, We are going to notify the
2 Secret Service.

3 THE COURT: Okay, the Secret Service. At that point
4 did you have any conversations that led you to believe that you
5 were being personally represented by someone at Bryan Cave in
6 this connection?

7 THE WITNESS: No. It followed later.

8 THE COURT: So keep going, then. When was it that you
9 first believed that you had an attorney/client privilege,
10 personal attorney/client privilege attach?

11 THE WITNESS: I don't remember the exact date, but
12 there was -- it was subsequent to my being contacted by Agent
13 Deal when I notified the firm.

14 THE COURT: You had already talked to him?

15 THE WITNESS: I spoke to him briefly because he sent
16 me an e-mail and called.

17 THE COURT: Okay.

18 THE WITNESS: And then I notified the firm.

19 THE COURT: When you talked to him, did he give you
20 any -- what did he say to you before the conversation began?

21 THE WITNESS: I don't remember if he gave me any
22 specific warnings in that conversation.

23 THE COURT: So anyway, keep going, then, after that
24 conversation.

25 THE WITNESS: After that conversation, there was

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1 potential civil litigation that the firm identified, so I had
2 numerous conversations and interviews with two members of the
3 firm's general counsel, as well as with litigation partners,
4 senior M&A partner, as well as with the managing partner of the
5 office.

6 THE COURT: At any time, did you say to them something
7 like, Do I have personal liability?

8 THE WITNESS: I didn't say that, but in our
9 conversation we talked about the potential that the firm could
10 be named and I could be named.

11 THE COURT: The firm being named.

12 THE WITNESS: Yes.

13 THE COURT: So this was all in terms of protecting the
14 firm, yes?

15 THE WITNESS: No. We talked about there was a
16 potential that the firm could be named in a civil lawsuit and I
17 could be named in a civil lawsuit.

18 THE COURT: Okay. Who brought up your being named?

19 THE WITNESS: It was in a conversation with
20 Vinnie Alfieri, Noah Weissman, and Jay Dorman. We were just
21 talking about the potential liabilities.

22 THE COURT: Approximately when was this?

23 THE WITNESS: It would have been in November or
24 December.

25 THE COURT: What did you say?

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1 THE WITNESS: I said that if there is a possibility
2 that we could be sued, I thought that we had done nothing
3 wrong, that we would cooperate, I would cooperate with the
4 firm.

5 THE COURT: What made you think that you were being
6 personally represented?

7 THE WITNESS: Well, we were having the conversations.
8 The purpose of the conversation was initially the firm had
9 potential liability and I had liability, so in my -- I assumed
10 that, in my cooperation with the firm, they would defend myself
11 and the firm because Bryan Cave has a reputation of
12 self-representing.

13 THE COURT: If I understand what you are saying, you
14 thought they were representing both you and the firm?

15 THE WITNESS: Correct.

16 THE COURT: You knew, as a lawyer, that that could
17 only occur if they and you saw no conflict.

18 THE WITNESS: Right, yeah, and I didn't see a
19 conflict.

20 THE COURT: You were busy telling them that you had
21 done nothing wrong and therefore they wouldn't have a reason to
22 see any conflict, right?

23 THE WITNESS: Right, and that I didn't see a conflict.

24 THE COURT: So if they represented both you and the
25 firm in your understanding, then was it your understanding that

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1 either side could waive the attorney/client privilege?

2 THE WITNESS: I don't remember. I think so. I don't
3 remember the specifics of that.

4 THE COURT: Before we got to the February 12 meeting,
5 you had just one conversation with the agent or several?

6 THE WITNESS: I think one e-mail and one brief phone
7 conversation.

8 THE COURT: At any point in time did you say to the
9 agent, Am I in trouble? Am I a subject? Anything like that?

10 THE WITNESS: No. When he called, he just notified me
11 that they were beginning their investigation.

12 THE COURT: When you had this meeting on February 12,
13 after Mr. Darden had been arrested, you answered the questions
14 they put to you, the agents put to you?

15 THE WITNESS: Yes.

16 THE COURT: So you weren't invoking any
17 attorney/client privilege. You were giving a third party your
18 answers, yes?

19 THE WITNESS: Well, for certain questions I invoked
20 attorney/client privilege.

21 THE COURT: You did?

22 THE WITNESS: Yes.

23 THE COURT: You said, I decline to answer on the
24 grounds of privilege?

25 THE WITNESS: Yes.

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1 THE COURT: And the privilege was the attorney/client
2 privilege?

3 THE WITNESS: There were certain -- when Agent Deal
4 came in, he said, We want to be very careful about the
5 attorney/client privilege, so certain things we are not going
6 to ask you or, if you feel it is attorney/client privilege,
7 don't answer it. There were a couple of instances -- one
8 instance where I stepped out with Ms. Buchanan asked her a
9 question, whether she thought something was privileged.

10 THE COURT: The privilege he was referring to, didn't
11 you understand that to be the privilege between the law firm
12 and its client that it had been representing in these matters?

13 THE WITNESS: Correct.

14 THE COURT: Not your attorney/client privilege.

15 THE WITNESS: Right.

16 THE COURT: Okay. Now I am with you. But other than
17 that attorney/client privilege, you answered the questions that
18 were put.

19 THE WITNESS: Correct.

20 THE COURT: Did you have conversations during that
21 meeting with Ms. Buchanan?

22 THE WITNESS: Yes.

23 THE COURT: Were any of them regarding your personal
24 liability as opposed to other things you might be discussing
25 with her?

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1 THE WITNESS: I asked her two questions that weren't
2 related to the firm's privilege.

3 THE COURT: What were they?

4 THE WITNESS: One, I asked her what does it mean to be
5 a subject of an investigation, and then I asked her regarding a
6 statute that one of the agents had referenced because I didn't
7 know what the statute was.

8 THE COURT: When the subject came up because
9 someone -- either the agents or she -- had asked were you a
10 subject or something like that.

11 THE WITNESS: Yes, Ms. Buchanan asked the agents.

12 THE COURT: What did they say?

13 THE WITNESS: At first they hesitated, then they said
14 that I was a subject of the investigation and they gave
15 information regarding the status of other people in the
16 investigation.

17 THE COURT: And Ms. Buchanan, in her response, did she
18 say anything other than explaining what a subject was?

19 THE WITNESS: In her response to me or response to the
20 agents?

21 THE COURT: Her response to you.

22 THE WITNESS: No. She just explained to me what a
23 subject was.

24 THE COURT: So you knew from her explanation that you
25 had at least some potential criminal liability.

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1 THE WITNESS: Correct.

2 THE COURT: Did you say to her at that point, or at
3 any point, do I need to get my own counsel?

4 THE WITNESS: No, I didn't ask her that.

5 THE COURT: The other question you asked her was what
6 a particular statute meant or what it was?

7 THE WITNESS: Yes.

8 THE COURT: Which statute was that?

9 THE WITNESS: I don't recollect.

10 THE COURT: A statute that the agents had cited.

11 THE WITNESS: Yes.

12 THE COURT: And she told you what it was.

13 THE WITNESS: Yes.

14 THE COURT: After that meeting, you were placed on
15 leave later in that day, right?

16 THE WITNESS: Correct.

17 THE COURT: That was in a conversation with
18 Mr. Alfieri?

19 THE WITNESS: Correct. We had a phone conversation
20 and then, either late that night or early in the morning, he
21 sent an e-mail formalizing.

22 THE COURT: Was that a conversation that he initiated
23 or you initiated?

24 THE WITNESS: He called me initially and then he
25 called me back later that evening.

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1 THE COURT: Did he say why you were being terminated?

2 THE WITNESS: Well, they placed me on leave.

3 THE COURT: Leave?

4 THE WITNESS: Yes, because of being named a subject.

5 THE COURT: Okay. Did you say anything to him about
6 the facts of the case?

7 THE WITNESS: He asked me generally what I had spoken
8 to the agents about, but I had given him numerous updates
9 previously, so he was up to date.

10 THE COURT: But you didn't ask him, What should I do
11 or anything like that?

12 THE WITNESS: No, not at that time.

13 THE COURT: On February 14, you spoke with the agents
14 again, yes?

15 THE WITNESS: The agents and assistant United States
16 attorney, Jim Pastore.

17 THE COURT: Who is that?

18 THE WITNESS: Jim Pastore I believe was his name.

19 THE COURT: This was a telephone conversation?

20 THE WITNESS: No, I went to the building nextdoor.

21 THE COURT: One St. Andrews Plaza.

22 THE WITNESS: Yes.

23 THE COURT: That was on the invitation from whom?

24 THE WITNESS: No, I recollected that there were two
25 potential pieces of information I had forgotten the day before,

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1 so I wanted to make sure that I gave that to the agents and the
2 government.

3 THE COURT: So you initiated the conversation, or you
4 initiated the meeting.

5 THE WITNESS: Yes, I wanted to give them that
6 information because I didn't want to omit anything.

7 THE COURT: And you didn't ask to have any attorney
8 come with you?

9 THE WITNESS: No, I did not.

10 THE COURT: If you had thought you were represented by
11 counsel at Bryan Cave, why wouldn't you have asked them to come
12 with you to that meeting?

13 THE WITNESS: For two reasons. One is, prior to, like
14 I said, the 12th, my understanding was that they were
15 representing me with regards to civil matters and, based upon
16 things that were obviously discussed after, I continued to have
17 that understanding. As far as the criminal matter, I didn't --
18 I felt that I had done nothing wrong, that I didn't have
19 anything to hide or keep from the government, and I wanted to
20 give them those two pieces of information.

21 THE COURT: So you didn't think they were representing
22 you in the criminal matter?

23 THE WITNESS: I thought at the meeting on the 12th
24 that they were, and then I chose to go down there without
25 counsel subsequent to that.

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1 THE COURT: At various times thereafter in March, you
2 got calls from Bryan Cave attorneys, and then eventually,
3 around March 28, you went down and met in their offices, true?

4 THE WITNESS: Correct, yes.

5 THE COURT: There were a number of attorneys there,
6 including Ms. Buchanan, Mr. Dorman, and Noah Weissman.

7 THE WITNESS: Right.

8 THE COURT: At that time, you understood this was a
9 meeting about the potential civil litigation.

10 THE WITNESS: Yes, because I had -- during some of
11 those conversations you referenced, there were -- I was getting
12 updates from Mr. Alfieri and others regarding a threatened
13 litigation. I'm not certain if it was in March or maybe right
14 after in April, a litigation that was filed, and they would
15 call and say, all right, the firm was named, but you weren't
16 named, but this other person is threatening to sue the firm and
17 you. So we were talking throughout that period regarding
18 potential civil litigation, and they wanted my cooperation with
19 regard to helping them out and helping myself out.

20 THE COURT: You already knew that you had been labeled
21 a subject.

22 THE WITNESS: Yes, correct.

23 THE COURT: And you knew that that was the ground at
24 which they had put you on leave.

25 THE WITNESS: Correct.

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1 THE COURT: So you knew that they couldn't be
2 representing you on the criminal side because there would be a
3 conflict of interest, yes?

4 THE WITNESS: Well, yeah, post that day I would
5 understand that.

6 THE COURT: So you thought this -- if you thought they
7 were representing you in connection with this meeting on March
8 28, it would have been on the civil side.

9 THE WITNESS: Correct.

10 THE COURT: At any point in that meeting -- first of
11 all, did you ask to be represented by your own counsel?

12 THE WITNESS: No. There were -- no. Vinnie had asked
13 me if I chose to get separate counsel to let him know, but I
14 told him at that time I declined to get separate counsel.

15 THE COURT: So at that meeting, he --

16 THE WITNESS: I'm sorry. That was a phone
17 conversation, not at the meeting.

18 THE COURT: I'm sorry?

19 THE WITNESS: That was a phone conversation, not at
20 the meeting.

21 THE COURT: I see. This is Mr. Alfieri?

22 THE WITNESS: Correct, sorry.

23 THE COURT: Before the meeting, in the telephone
24 conversation with Mr. Alfieri, he had said, Do you want
25 separate counsel and you had declined?

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1 THE WITNESS: I'm not sure whether it was before or
2 after the meeting. It was in the same time period.

3 THE COURT: But at the meeting you didn't raise this?

4 THE WITNESS: No. At the meeting, for example, I
5 believed I was getting counsel. For example, Mr. Weissman
6 advised me on exercising attorney/client privilege and certain
7 things --

8 THE COURT: That, again, though was the privilege
9 between Bryan Cave and the firm's client, yes?

10 THE WITNESS: Well, in our conversation, we were
11 talking about protecting myself from civil liability.

12 THE COURT: But I am just trying -- my understanding
13 from your affidavit, you say here at paragraph 10 of your
14 affidavit, "During this interview, Noah Weissman spoke to me
15 about the possibility of civil litigation occurring.
16 Mr. Weissman emphasized that if I were called to be deposed in
17 connection with or testify in any civil proceeding, I should be
18 vigilant about preserving the attorney/client privilege that
19 existed between Bryan Cave, Reign, and/or Mr. Darden, Sr.,"
20 right? That's the attorney/client privilege he was talking
21 about.

22 THE WITNESS: Correct.

23 THE COURT: Okay. Let me ask your counsel if she
24 wants to put any additional questions.

25 Counsel?

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Newkirk - Direct

1 DIRECT EXAMINATION

2 BY MS. CHAUDHRY:

3 Q. Mr. Newkirk, the evening of February 12, did Mr. Alfieri
4 send you an e-mail telling you that you had been suspended?

5 A. Yes. It could have been late that evening or early in the
6 morning. The time stamp is on it.

7 Q. Did he tell you that you are required to keep cooperating
8 with the firm?

9 A. Yes.

10 Q. And did you keep cooperating with the firm?

11 A. Yes.

12 Q. Did you answer all of their questions?

13 A. Yes.

14 Q. Did you provide them with materials that the firm didn't
15 already have access to?

16 A. Yes.

17 Q. Did you meet with the firm?

18 A. Yes.

19 Q. Were you doing this under the understanding that you were
20 working on a joint defense basis with the firm in connection
21 with the civil --

22 THE COURT: Sustained, leading.

23 Q. Why did you do that?

24 A. I felt that we had a joint interest and that our interests
25 were aligned.

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Newkirk - Direct

1 Q. In what?

2 A. In defending ourselves against the litigation.

3 Q. Did the firm ever tell you that you had no privilege with
4 regards to these conversations?

5 A. No.

6 Q. Do you know what an *Upjohn* warning is?

7 A. At that time I didn't.

8 Q. Do you know now?

9 A. Yes.

10 Q. What is your understanding of what an *Upjohn* warning is?

11 A. Now it is when there is an employee/employer relationship
12 and there is some form of investigation, that the employer will
13 give the employee a warning that they do not represent the
14 employee and that there are certain steps that they should take
15 on being given that warning.

16 Q. Did anything like that ever happen?

17 A. No.

18 Q. To this date, did Bryan Cave give you anything resembling
19 an *Upjohn* warning?

20 A. No.

21 Q. Did Bryan Cave give you anything in writing between the
22 beginning of the Maxim transaction and today?

23 A. No.

24 Q. Did Bryan Cave ever give you a list of lawyers for you to
25 hire to represent yourself?

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Newkirk - Direct

1 A. No.

2 Q. Did Bryan Cave ever discuss with you a joint representation
3 of you and another lawyer?

4 A. I don't understand the question. Sorry.

5 THE COURT: I'm glad you raised that objection,
6 because neither do I.

7 MS. CHAUDHRY: Thank you.

8 Q. Did Bryan Cave ever discuss the civil litigation with you
9 in the context of you hiring another firm?

10 A. No, they were self-representing on the civil litigation at
11 that point.

12 Q. By self-representing, what do you mean?

13 A. The firm was -- attorneys at the firm were handling the
14 discussions with the parties that were suing and/or threatening
15 to sue and handling the interviews.

16 Q. Did Bryan Cave tell you that they were providing the
17 information you gave them to anyone else?

18 A. No.

19 Q. Did you think that they were doing that?

20 A. No.

21 Q. If you had believed that Bryan Cave was turning this
22 information over to another party, what would you have done?

23 A. I would not have given them the information or at least
24 asked them what the basis was to make an informed decision.

25 Q. Did you know at the time that Bryan Cave was cooperating

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Newkirk - Direct

1 with the government?

2 A. No.

3 THE COURT: Were you cooperating with the government?

4 THE WITNESS: I guess if -- I answered the questions
5 on the 12th.

6 THE COURT: And you went down to add further
7 information.

8 THE WITNESS: Yes.

9 THE COURT: Before you went down to add further
10 information on the 14th, did you ask Bryan Cave whether they
11 approved of your going down?

12 THE WITNESS: No, but when I told Vinnie after, he
13 said I should have let him know and to let him know if I am
14 going to talk to the government again or talk to anybody else.

15 THE COURT: All right.

16 BY MS. CHAUDHRY:

17 Q. Before you went down on your own on the 14th, did you
18 notify the firm that you were reaching out to the agents?

19 A. No, not specifically.

20 Q. Did you ask the firm for the agents' contact information?

21 A. Yes.

22 Q. Did the firm provide it?

23 A. Yes.

24 Q. On February 12, Judge Rakoff asked you how you got into
25 that conference room. Who called you to tell you to come back

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Newkirk - Direct

1 into the office?

2 A. Jay Dorman, who at that time was a partner and head of the
3 M&A group.

4 Q. Someone you already knew?

5 A. Yes.

6 Q. Is he someone you were working with on the civil litigation
7 side of this?

8 A. Yes.

9 Q. What did he tell you?

10 A. He asked me to come back to the office. I didn't ask him
11 why, I just came back because he gave me a call.

12 Q. Where did you go in the office?

13 A. I went back -- he and I were on the same floor, and I don't
14 remember if I bumped into his secretary or him first, but when
15 I was coming off the elevator, I bumped into someone who told
16 me to go down to the conference room or to the conference
17 floor. I went down to 35B, and that's when I bumped into
18 Austin and he introduced himself to me.

19 Q. How many people were in that conference room?

20 A. Three at the time.

21 Q. Who were they?

22 A. Austin Campriello, Agent Deal, and Agent Hilliard.

23 Q. When did you learn that you had been called back to speak
24 to the agents?

25 A. Well, I knew they called me back, but I didn't speak to the

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Newkirk - Direct

1 agents as I walked into the room.

2 Q. Did Mr. Campriello speak to you outside of the room?

3 A. No.

4 Q. What exactly did he tell you in the conference room?

5 A. Shook my hand, introduced himself; said we hadn't spoken
6 other than in passing; told me that he was a white collar
7 defense attorney; told me that the agents were here to talk
8 about the Maxim transaction; that he wouldn't be sitting in the
9 meeting, and that Mary Beth Buchanan, who I may have met at the
10 previous partners luncheon, would be sitting in.

11 Q. What was your understanding of why he was there?

12 A. I thought he was there at that point representing me but
13 that Mary Beth would be handling the matter, so that he was,
14 you know, there as a placeholder.

15 Q. Did he prep you at all for the meeting?

16 A. No.

17 Q. Did he take you outside the room and ask you about the
18 transaction?

19 A. No.

20 Q. Did he tell you whether he had spoken to the government
21 before you walked into the room?

22 A. No.

23 Q. Did he tell you that he was not there to represent you?

24 A. No.

25 Q. Did he tell you you should get your own lawyer?

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Newkirk - Direct

1 A. No.

2 Q. Did he recommend any lawyers to you?

3 A. No.

4 Q. Did he tell you that you should not speak to the
5 government?

6 A. No.

7 Q. Did you have an impression of whether, based on your
8 interaction with him, that you should speak to the government?9 A. I know that the firm wanted me to. That's why Jay called
10 me back. I assumed when he walked in he knew why he called me.
11 So it's my understanding the firm wanted me to speak to the
12 government.13 THE COURT: You didn't have any hesitancy at that
14 meeting in talk to the agents, did you?15 THE WITNESS: No, because I felt that I did nothing
16 wrong. The firm called me back just --17 THE COURT: Right. In law school I assume you had a
18 course in criminal law?

19 THE WITNESS: First year, yes.

20 THE COURT: So you were familiar with what the Fifth
21 Amendment provided, yes?

22 THE WITNESS: Yes.

23 THE COURT: Go ahead, counsel.

24 BY MS. CHAUDHRY:

25 Q. How long did you speak with Mr. Campriello before Mary Beth

F812newH

Newkirk - Direct

1 Buchanan showed up?

2 A. I spoke to him in the corner for about a minute, we sat
3 down, and then within a couple of minutes of that she walked in
4 the room.

5 Q. Did you know Mary Beth Buchanan before she walked into that
6 room?

7 A. She had been introduced at a meeting, I think in maybe
8 November or December -- I'm not certain when -- when she joined
9 the office, so they went through her background and history as
10 being a former U.S. Attorney.

11 Q. Had you ever spoken to her before?

12 A. At that meeting briefly. We were a couple of chairs away,
13 so I introduced myself to her, but not a substantive
14 conversation.

15 Q. Had you ever spoken to Ms. Buchanan about the Maxim
16 transaction?

17 A. No.

18 Q. Had you ever spoken to Mr. Campriello about the Maxim
19 transaction?

20 A. No.

21 Q. How long did you speak to Ms. Buchanan before the interview
22 began?

23 A. Very briefly. She introduced herself and then sat down and
24 the agent continued. They gave her a brief update of what they
25 had said before she came in, and then they continued.

F812newH

Newkirk - Direct

1 Q. How did she introduce herself?

2 A. To me or to the agents?

3 Q. Both, please.

4 A. Well, when she was introduced to the agents, Agent Deal
5 said he knew who she was. She introduced herself to me. She
6 gave me her full name, said she had just joined -- I don't
7 think she remembered that we had spoken briefly -- and she told
8 me that she was in the white collar group.

9 Q. What was your understanding of why she was there?

10 A. I thought that she was representing myself and the firm.

11 Q. And did she give you anything that is like an *Upjohn*
12 warning?

13 A. No.

14 Q. Did she tell you to get your own lawyer?

15 A. No.

16 Q. Did she tell you you don't have to speak to the agents?

17 A. No.

18 Q. Did she tell you that you could delay this meeting and talk
19 to her before?

20 A. No.

21 Q. Did she give you any names of lawyers that you should hire?

22 A. No.

23 Q. Did she tell the agents to leave because she hadn't spoken
24 to you yet?

25 A. No.

F812newH

Newkirk - Direct

1 Q. Did she tell you that you could ask her questions during
2 the meeting?

3 A. Yes.

4 Q. Is there anything she said you could not ask her about?

5 A. No.

6 Q. Did she answer all of your questions?

7 A. Yes, she answered the few questions I asked of her, yes.

8 Q. Did you step outside the room with her?

9 A. Yes.

10 Q. Did she tell you that she is not there to represent you?

11 A. No.

12 Q. If she had said that, what would you have done?

13 A. I would have thought about what the purpose of the meeting
14 was and who to call to get advice on what to -- what the
15 meeting was about, what to say, what was the proper procedure.

16 Q. After that meeting, did you speak with Mary Beth Buchanan?

17 A. Briefly after the meeting ended.

18 Q. What did you talk to her about?

19 A. She had asked if I was a subject at the end of the meeting.
20 That's when I asked her what did being a subject mean, and then
21 she told me what it meant. Then she told me she was going to
22 call Mr. Alfieri and let him know what happened at the meeting
23 and that the government had said I was a subject.

24 Q. At any time after that meeting, did Ms. Mary Beth Buchanan
25 memorialize with you an understanding that she did not

F812newH

Newkirk - Direct

1 represent you at that meeting?

2 A. No.

3 Q. At any point after that meeting, did anyone from Bryan Cave
4 memorialize with you that you were not represented at that
5 meeting?

6 A. No.

7 Q. At any point did Mary Beth Buchanan tell you that
8 everything you tell her, she can reveal to the government.

9 A. No.

10 Q. At any point did Mary Beth Buchanan tell you that anything
11 you tell her, she can reveal to Calvin Darden, Sr.?

12 A. No.

13 Q. Did she subsequently speak to you after February 12?

14 A. She sent me an e-mail, but Vinnie jumped in, so I finished
15 that conversation with Vinnie.

16 Q. Did Mary Beth Buchanan --

17 A. Sorry. She did speak to me on the interview on -- I forgot
18 the date, March 28.

19 Q. At any point did Mary Beth Buchanan suggest to you a list
20 of lawyers you should hire once she told you that you were a
21 subject?

22 A. No.

23 Q. Did anyone at Bryan Cave ever suggest to you hiring a
24 lawyer?

25 A. No, other than Vinnie asking me if I was going to get

F812newH

Newkirk - Direct

1 separate counsel.

2 Q. Did anyone provide a list of lawyers, criminal defense
3 lawyers for you?

4 A. No.

5 Q. If, on February 12, Austin Campriello had told you not to
6 meet with the government, would you have met with the
7 government?

8 A. No.

9 Q. If, on February 12, Mary Beth Buchanan would have told you
10 not to meet with the government, would you have met with the
11 government?

12 A. No.

13 MS. CHAUDHRY: Just one second.

14 (Counsel confer)

15 Q. You had mentioned that Bryan Cave had asked you to fully
16 cooperate?

17 A. Yes.

18 Q. Did you fully cooperate with them?

19 A. Yes.

20 Q. Would you have done so had you thought that they would
21 reveal everything you told them to anyone they chose?

22 A. No.

23 MS. CHAUDHRY: I have no further questions, your
24 Honor.

25 THE COURT: Anything from the government?

F812newH

Newkirk - Cross

1 MR. ADAMS: Yes, your Honor. Thank you.

2 CROSS EXAMINATION

3 BY MR. ADAMS:

4 Q. Mr. Newkirk, in your affidavit, you say that you were the
5 originating attorney on this deal, is that right?

6 A. Correct, yes.

7 Q. And the entity that retained Bryan Cave, in your view, was
8 the Reign Entertainment Group, is that right?

9 A. Yes, that was the original entity.

10 Q. And you said that you participated in some conversations
11 about some civil litigation after news of a fraudulent wire
12 transfer had come to light in about November, is that right?

13 A. Yes.

14 Q. That's November of 2013?

15 A. Yes.

16 Q. And I believe you said you spoke with Mr. Dorman about
17 that, is that correct?

18 A. Mr. Dorman, Mr. Alfieri, Mr. Weissman.

19 Q. In speaking about that fraudulent wire transfer, did you
20 explain the circumstances under which that wire had been sent?

21 A. In different conversations, yes.

22 Q. You spoke to Mr. Dorman about those circumstances?

23 A. Yes.

24 Q. Did you also talk about some of the background to that
25 wire?

F812newH

Newkirk - Cross

1 A. What do you mean by "background"?

2 Q. Did you discuss with Mr. Dorman a Bank of America statement
3 purporting to show the assets of Calvin Darden, Sr.?

4 MS. CHAUDHRY: Objection.

5 THE COURT: Ground?

6 MS. CHAUDHRY: Both outside the scope and relevance.

7 THE COURT: I will allow it.

8 A. What was the question?

9 Q. Did you discuss with Mr. Dorman the Bank of America
10 statement purporting to shows the assets of Calvin Darden, Sr.,
11 after the fraudulent wire --

12 A. Yes, we had discussions with regard that statement.

13 Q. Had you discussed that statement with Mr. Darden before the
14 wire had --

15 A. Before the wire, Mr. Darden wasn't on the transaction.

16 Q. But you hadn't discussed that with Mr. Darden before the
17 wire, correct?

18 A. Correct.

19 Q. And that Bank of America statement was a September 2013
20 Bank of America statement, is that correct?

21 A. Correct.

22 Q. It was also an October 2013 Bank of America statement,
23 correct?

24 MS. CHAUDHRY: Objection: relevance.

25 THE COURT: I am beginning to wonder about the

F812newH

Newkirk - Cross

1 relevance of any of this.

2 MR. ADAMS: Your Honor, with respect to -- this goes
3 to Mr. Newkirk's belief, one, that he did not do anything wrong
4 or that the firm would not have believed that he had done
5 anything wrong and, thus, that there was no obvious conflict
6 between the two such that Bryan Cave could have believed it was
7 personally representing him in connection with some civil
8 litigation.

9 MS. CHAUDHRY: Would you like me to respond?

10 THE COURT: Well, I think the global question, which I
11 think he has already answered, but let me put it to him:

12 Did you ever at any time say to the Bryan Cave
13 attorneys or any of them that you felt you had done something
14 wrong?

15 THE WITNESS: No.

16 THE COURT: Did they ever say to you that they
17 believed you had done something wrong?

18 THE WITNESS: No. After the arrest they asked me
19 questions which I answered, but never that statement.

20 THE COURT: Okay. I don't think we need to get into
21 further detail on that.

22 MR. ADAMS: Thank you, your Honor.

23 BY MR. ADAMS:

24 Q. Mr. Newkirk, let me direct your attention to February 12,
25 2014. That was the first time that you had met Mr. Campriello,

F812newH

Newkirk - Cross

1 is that correct?

2 A. I had met him in passing. It was the first time I had a
3 real conversation with him.

4 Q. That's the first time you had any conversation with
5 Ms. Buchanan, is that correct?

6 A. No. At her luncheon, I spoke to her briefly. I was a
7 couple of seats away.

8 Q. Before that date, had you ever spoken about anything
9 regarding the Maxim transaction with either Mr. Campriello or
10 Ms. Buchanan?

11 A. No.

12 Q. When you were introduced to Ms. Buchanan that day, there
13 were two law enforcement agents present in the same room, is
14 that right?

15 A. Yes.

16 Q. And they were there when the introduction between you and
17 Ms. Buchanan was made on that day?

18 A. Yes.

19 Q. And you agreed to speak with the agents on that day,
20 correct?

21 A. Yes.

22 Q. Before that interview began, you did not consult privately
23 with Ms. Buchanan, did you?

24 A. No.

25 Q. In fact, you didn't have any private discussions with her

F812newH

Newkirk - Cross

1 at all at any point before speaking with law enforcement agents
2 on that day, right?

3 A. No.

4 Q. Let me direct you to the following day, the day after the
5 interview, on February 13, 2014. You received an e-mail from
6 Vincent Alfieri, correct?

7 A. I think the e-mail was sent the night before in the early
8 morning and the time stamp is off, but I responded to him in
9 the morning, the following morning.

10 MR. ADAMS: Your Honor, marked as Government Exhibit 3
11 there is a stipulation which I would offer. If you want me to
12 read it, I am happy to read it.

13 THE COURT: Let me just get my copy from my law clerk.

14 So Exhibits 1, 2, and 3, received.

15 MR. ADAMS: Thank you, your Honor.

16 (Government's Exhibits 1, 2 and 3 received in
17 evidence)

18 MR. ADAMS: Your Honor, may I approach?

19 THE COURT: Yes.

20 BY MR. ADAMS:

21 Q. Mr. Newkirk, showing you what has been marked as Government
22 Exhibit 3, do you recognize that e-mail?

23 A. Yes.

24 Q. This is the e-mail where --

25 A. It is not the complete thread, but yes.

F812newH

Newkirk - Cross

1 Q. This is an e-mail where -- or this includes an e-mail where
2 Mr. Alfieri provided you the contact information for Agent
3 Deal, correct?

4 A. Correct.

5 Q. In your affidavit on -- in paragraph 8, you state that you
6 had e-mailed Mr. Alfieri to see if he had Agent Deal's contact
7 information. This is the response to that e-mail request,
8 right?

9 A. Correct.

10 Q. Mr. Alfieri provided the contact information in an e-mail,
11 not during a phone call, right?

12 A. Correct.

13 Q. Mr. Alfieri is a labor lawyer primarily, is that right?

14 A. He is a litigator. I'm not certain what area he
15 specializes in.

16 Q. He is the managing partner at Bryan Cave, correct?

17 A. Of the New York office, yes.

18 Q. And you don't know what Mr. Alfieri's primary practice --
19 primary practice area is?

20 A. No, I was at the firm a short time and we never worked on a
21 matter together.

22 Q. Mr. Alfieri is one of the primary attorneys to recruit you
23 to Bryan Cave, wasn't he?

24 A. Yes.

25 Q. You had multiple conversations with Mr. Alfieri, correct?

F812newH

Newkirk - Cross

1 MS. CHAUDHRY: Objection: relevance.

2 THE COURT: Sustained.

3 Q. Nowhere in that e-mail in Government Exhibit 3 does
4 Mr. Alfieri indicate that Bryan Cave or anyone at Bryan Cave is
5 representing you personally.

6 THE COURT: I have read the e-mail, counsel.

7 MR. ADAMS: Thank you, sir.

8 Q. After you got Agent Deal's contact information, you reached
9 out and contacted Agent Deal shortly thereafter, right?

10 A. Correct.

11 Q. And before you contacted Agent Deal, you did not consult
12 with Mary Beth Buchanan, did you?

13 A. No.

14 Q. You didn't ask Ms. Buchanan to reach out to Agent Deal on
15 your behalf, did you?

16 A. No.

17 Q. You didn't ask Mr. Campriello to reach out to Agent Deal on
18 your behalf, did you?

19 A. No.

20 Q. You did, however, eventually meet with the agents on about
21 February 14, 2014, right?

22 A. Yeah, I believe -- yes, that was the correct date.

23 Q. And you went there by yourself, right?

24 A. Correct.

25 Q. You didn't invite Ms. Buchanan along for that meeting,

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Newkirk - Cross

1 correct?

2 A. No, I did not.

3 Q. And you didn't invited Mr. Campriello to join you on that
4 day, did you?

5 A. Correct.

6 THE COURT: I want to, just to move things along,
7 caution both counsel that follow-up questions that are
8 self-evident from the answer to the previous questions are just
9 a waste of time.

10 Go ahead, counsel.

11 MR. ADAMS: Okay.

12 Q. Mr. Newkirk, you were a party to a lawsuit entitled One
13 West v. Harvey Newkirk, correct?

14 MS. CHAUDHRY: Objection: relevance.

15 THE COURT: Overruled.

16 A. Yes.

17 Q. You represented yourself *pro se* in that lawsuit, didn't
18 you?19 A. The lawsuit didn't initiate. I showed up for a hearing and
20 I paid off the money to settle.

21 MR. ADAMS: Your Honor, may I approach?

22 THE COURT: Yes.

23 Q. Let me show you what I have marked as Government Exhibit 6.
24 Mr. Newkirk, do you recognize that document?

25 A. Yes, I do.

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Newkirk - Cross

1 Q. What is it?

2 A. It is titled a conference order.

3 Q. Is that an order from the civil litigation that you were
4 just discussing a second ago?

5 A. Yes, it is.

6 MR. ADAMS: Your Honor, the government offers
7 Government Exhibit 6.

8 THE COURT: I will receive it, but I think -- I do
9 think it meets the very modest threshold of relevance, which is
10 why I overruled the objection. I think its materiality is not
11 of an order that would warrant further questions about it.

12 MR. ADAMS: Thank you, your Honor.

13 BY MR. ADAMS:

14 Q. Not to belabor a related point but, Mr. Newkirk, you also
15 represented yourself *pro se* in a lawsuit entitled Joshua Malvin
16 v. Harvey Newkirk?

17 A. Yes. Similarly, in that, there were only conferences and a
18 settlement.

19 Q. Mr. Newkirk, turning back to February 14 for a moment, you
20 understood that Bryan Cave was not representing you during that
21 meeting with the government, correct?

22 A. Which date?

23 Q. February 14.

24 A. Yeah, I went there without counsel, yes.

25 Q. And you understood, after being placed on leave by Bryan

F812newH

Newkirk - Cross

1 Cave, that there would obviously be a conflict between you and
2 Bryan Cave at that point, correct?

3 A. No, I didn't think that there would be a conflict on the
4 civil matters.

5 Q. You understood that you were a subject of the investigation
6 at that point, right?

7 A. Yes.

8 Q. But you didn't believe that there was a potential conflict
9 between you and Bryan Cave with you as a subject of a criminal
10 investigation?

11 MS. CHAUDHRY: Objection. Asked and answered.

12 THE COURT: Overruled.

13 A. No.

14 Q. And, similarly, at that point that you had been declared a
15 subject, you didn't believe that there was a conflict between
16 you and Bryan Cave in some potential civil litigation, is that
17 right?

18 A. I thought that was the previous question, sir. What was
19 the previous question to make sure I answered it properly?

20 Q. My first question was, knowing that you were a subject of a
21 criminal investigation, did you believe that there was no
22 conflict between and you Bryan Cave with respect to a criminal
23 investigation?

24 A. That's not my area of expertise, so I didn't know. I have
25 since learned that that is a position.

F812newH

Newkirk - Cross

1 Q. At that time you had no understanding that there was or
2 could have been a conflict between you and Bryan Cave with you
3 as the subject of a criminal investigation?

4 A. I didn't think about that.

5 Q. And you didn't ask anyone at Bryan Cave about that either,
6 did you?

7 A. No.

8 Q. You were charged by complaint on April 1, 2015, right?

9 A. Yes.

10 Q. You retained Ms. Chaudhry and her firm shortly after being
11 charged, is that right?

12 MS. CHAUDHRY: Objection: relevance.

13 THE COURT: I will allow a little of this area.

14 A. I am not sure if it was before or after. I think it was
15 before, but I'm not certain.

16 Q. Let me ask you this: Before you were charged, you were
17 briefly represented by an attorney named James Roth, correct?

18 A. Correct.

19 MS. CHAUDHRY: Objection: relevance.

20 THE COURT: Overruled.

21 Q. And after you were represented by Mr. Roth, you retained
22 Ms. Chaudhry and her firm, correct?

23 A. Correct.

24 Q. And after you had obtained Ms. Chaudhry and her firm as
25 counsel, you appeared in this court to be presented in

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Newkirk - Cross

1 connection with the criminal complaint, is that right?

2 MS. CHAUDHRY: Objection, relevance.

3 THE COURT: We will see. I'm not sure, but I will
4 allow this as foundational. The court will take judicial
5 notice of the fact that he appeared before this court.

6 MR. ADAMS: Thank you, sir.

7 Q. When you retained Ms. Chaudhry, you were not being
8 represented by Bryan Cave, were you?

9 A. No.

10 Q. You didn't believe that you were being represented by Bryan
11 Cave at that point, did you?

12 A. No, because of something Agent Deal told me.

13 Q. Nowhere in your affidavit do you say when you believed that
14 your representation by Bryan Cave ended, do you?

15 A. I don't remember. I have to look at it.

16 Q. You were here on June 12 of this year at a pretrial
17 conference before the court on this matter, right?

18 MS. CHAUDHRY: Objection: relevance.

19 THE COURT: So the answer, since I was there, the
20 answer is yes. Put the next question.

21 Q. Mr. Newkirk, you heard Ms. Chaudhry tell the court on that
22 day that she had just learned the prior day, June 11, that you
23 had previously been represented by Bryan Cave in this matter,
24 right?

25 A. Yes, based upon conversations that she had -- she and I

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Newkirk - Cross

1 had.

2 Q. Between the time that you retained Ms. Chaudhry prior to
3 being charged and June 11 of 2015, you never mentioned that you
4 were --

5 MS. CHAUDHRY: Objection: goes into attorney/client
6 communications.

7 THE COURT: Well, it is not attorney/client
8 communication because he is trying to establish a negative. He
9 assumes the answer would be no, but I think, again, the
10 materiality of this approaches -- zero would be unfair -- .0001
11 probably would be fair, so why don't we move on?

12 MR. ADAMS: Your Honor, very briefly.

13 Q. Mr. Newkirk, you met with Agent Deal and Agent Hilliard on
14 January 22, 2015, and March 17, 2015, right?

15 A. I met with them twice. I'm not sure if those were the
16 exact dates, but they came by my office twice, yes.

17 Q. At neither of those meetings were you present with counsel,
18 right?

19 A. No. Those were unscheduled meetings in which they stopped
20 by my office.

21 Q. And you had a phone at your office, right?

22 A. I do.

23 Q. You didn't call Bryan Cave on that day or either of those
24 days, did you?

25 A. Again, based upon the conversation I had with Agent Deal at

F812newH

Newkirk - Redirect

1 that meeting.

2 Q. You actually came into the U.S. Attorney's office another
3 time after the second meeting with the agents, right?

4 A. Yes.

5 Q. And, again, you did not have counsel on that day either,
6 right?

7 A. Correct.

8 Q. In fact, you, Agent Hilliard, and I walked over to this
9 court and had counsel appointed for you on that day, right?

10 A. Agent Hilliard and I walked over. You walked over
11 separately, yes.

12 Q. And at no point during any of the proceeding on the day
13 that you had counsel appointed did you mention that you had
14 been represented by Bryan Cave, did you?

15 A. I didn't say anything to you. That was the instruction I
16 was given.

17 MR. ADAMS: No further questions, your Honor.

18 THE COURT: Anything else?

19 MS. CHAUDHRY: Just two follow-up questions.

20 THE COURT: Go ahead.

21 REDIRECT EXAMINATION

22 BY MS. CHAUDHRY:

23 Q. Mr. Newkirk, Mr. Adams just asked you about Jay Dorman's
24 entry into this case and you said, I believe, that he wasn't
25 involved previously. Can you explain what you meant by that?

F812newH

Newkirk - Redirect

1 A. After we got notice of the -- at that time an alleged
2 spoofing of e-mail, Jay then started working on the case. So
3 he took over the matter basically and he was the -- in charge
4 of the matter from mid November until the arrest.

5 Q. Can you please list for us all the attorneys at Bryan Cave,
6 including the general counsel's office, that you began working
7 with once the spoofed e-mail situation came up?

8 A. Jay Dorman, Noah --

9 Q. Also tell us what division they are in.

10 A. Jay Dorman, at that time he was a corporate partner; Noah
11 Weissman, litigation partner; Vincent Alfieri, litigation
12 partner; Laura Giokas, general counsel's office and litigation;
13 Mike McKinnis, general counsel to the firm; and there were a
14 couple of other people in the New York office who I don't
15 remember offhand but -- I am trying to think -- there were one
16 or two other partners; Jeff Chavkin, a partner.

17 Q. In what department?

18 A. Corporate. And then maybe one other person. I can't
19 remember specifically.

20 Q. And for all the litigation partners you mentioned, what was
21 your understanding of why they were now involved?

22 A. Because there was threatened litigation -- threatened and
23 actual litigation against the client; there was threatened
24 litigation against the firm, which at some point became actual
25 litigation; and then, just looking over the transaction, so

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Newkirk - Redirect

1 they were involved in looking at the documents and negotiating
2 settlements, etc.

3 THE COURT: Okay.

4 MS. CHAUDHRY: Thank you.

5 THE COURT: Thank you very much. You may step down.

6 We are next going to call Ms. Buchanan on the phone,
7 so what I want is the reporter to come --

8 MR. SILVERMAN: Your Honor, Mr. Campriello, who, as
9 you know, is on trial --

10 THE COURT: He is going to just have to wait.

11 MR. SILVERMAN: Okay.

12 THE COURT: I am trying to accommodate Ms. Buchanan at
13 her request.

14 MR. SILVERMAN: Thank you, your Honor.

15 THE COURT: What I should have done is had her appear
16 here personally, have Mr. Campriello appear at 7 p.m. when he
17 couldn't possibly have had anything better to do than to eat
18 dinner. If you don't mind, Mr. Silverman, he and you will
19 wait.

20 MR. SILVERMAN: Of course, your Honor. Thank you.

21 (Pause)

22 THE COURT: Can you hear me?

23 THE WITNESS: I can, Judge.

24 THE COURT: I need to first place you under oath.

25 MARY BETH BUCHANAN,

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Newkirk - Redirect

1 having been duly sworn, testified as follows:

2 THE COURT: Ms. Buchanan, tell us briefly your
3 educational and occupational background.

4 THE WITNESS: I am a graduate of California University
5 of Pennsylvania in 1984 and in 1987, graduate of the University
6 of Pittsburgh School of Law.

7 I began my legal career in Pittsburgh as an associate
8 with a medium-sized law firm for approximately one year. I
9 then became an assistant United States Attorney in the Western
10 District of Pennsylvania, where I served for almost 13 years.
11 Then, in 2001, I was appointed to serve as the United States
12 Attorney for the same district; and for the next eight years I
13 held that position as well, as several other concurrent
14 positions at the Department of Justice.

15 In 2009, near the end of 2009, I left that position.
16 I joined the United Nations after that as the United Nations
17 first ethics and reputational risk officer. I held that job
18 until some point in 2013.

19 I then joined Bryan Cave as a partner in October of
20 2013.

21 THE COURT: I should have mentioned before that we are
22 here in open court. There is a reporter taking down everything
23 that is said, and there is counsel for both the government and
24 Mr. Newkirk, as well as Mr. Newkirk himself and counsel for
25 Bryan Cave.

F812newH

Newkirk - Redirect

1 So there was an occasion on February 12, 2014, when,
2 as I understand it, you were called to a meeting that involved
3 Mr. Newkirk and two federal agents, is that correct?

4 THE WITNESS: That's essentially correct, your Honor.
5 At some point during the afternoon of February the 12th, 2014,
6 I was advised by members of Bryan Cave that later that day a
7 meeting would occur between Harvey Newkirk and several federal
8 agents and they had questions to ask him about the Maxim
9 transaction. The firm did not want to be obstructionist in any
10 way but was concerned that Harvey Newkirk's answering of
11 questions could breach our attorney/client privilege with our
12 client, and so I was asked to attend that meeting and make sure
13 that we protected the privilege that existed between our client
14 and Bryan Cave.

15 THE COURT: My understanding was that you were called
16 to the meeting by Mr. Campriello, is that right?

17 THE WITNESS: I believe that I was told about the
18 meeting by Austin Campriello and some decision was made -- I
19 think by Mr. Campriello, possibly by Mr. Alfieri -- to ask me
20 to attend the meeting.

21 THE COURT: Why was Mr. Campriello involved.

22 THE WITNESS: I believe that earlier that day
23 Mr. Alfieri, the managing partner of our firm, had received a
24 call regarding an arrest of Calvin Darden, Jr., and a request
25 to come in and talk to Harvey Newkirk. I believe that

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1 Mr. Alfieri first spoke to Mr. Campriello about it, and it was
2 later in the day that I was then brought in to the discussion.

3 THE COURT: So do I have it correct that, based on
4 that, you understood that this was a serious criminal
5 investigation?

6 THE WITNESS: What I knew at the time was that Calvin
7 Darden, Jr., had been taken into custody that day.

8 THE COURT: And that the agents who had asked to speak
9 with Mr. Newkirk were criminal investigatory agents, yes?

10 THE WITNESS: Yes, your Honor, I did.

11 THE COURT: Was any consideration given to advising
12 Mr. Newkirk that he might need counsel?

13 THE WITNESS: I did not have any discussions with him
14 beforehand. I don't know what discussions occurred between him
15 and Mr. Alfieri or the agents. I only came in to it for the
16 purpose of protecting the attorney/client privilege, so I don't
17 know whether any consideration was given to that.

18 THE COURT: When you came in, did you have any
19 conversation with Mr. Newkirk at that time.

20 THE WITNESS: I did not, your Honor. In fact, I was
21 sitting in the room, the interview room, which was a conference
22 room, large room, with Mr. Campriello and two federal agents.
23 We were already seated at the table, and we were explaining to
24 the agents that we would not obstruct the interview; however,
25 we were there to protect our attorney/client privilege; that if

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1 we thought at any time that the question was inappropriate,
2 that we would make an objection, and they agreed they would put
3 the question aside and we would address it at a later time. So
4 I didn't have any opportunity to speak with Mr. Newkirk because
5 we were already in the room when Mr. Newkirk entered the room.

6 THE COURT: Well, you could have asked to go outside
7 with Mr. Newkirk, yes.

8 THE WITNESS: I suppose I could have, but I wasn't
9 there to represent him.

10 THE COURT: I understand.

11 Do you know whether or not Mr. Campriello had had any
12 conversation with Mr. Newkirk before you entered the room
13 regarding the situation, private conversation as opposed to in
14 front of the agents?

15 THE WITNESS: I don't know, but not that I am aware
16 of.

17 THE COURT: Did Mr. Campriello stay or did he leave?

18 THE WITNESS: Mr. Campriello stayed for just a few
19 minutes at the beginning of the interview. He then asked me if
20 I was okay to proceed without him and he left a few minutes
21 into the interview.

22 THE COURT: Did there come a point in the conversation
23 when you asked the agents whether Mr. Newkirk was a subject, or
24 something to that effect.

25 THE WITNESS: At the very end of the interview -- and

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1 I believe the interview was concluded at this point, and people
2 were putting their papers back together, and I believe it was
3 me who asked the agents whether -- what did they consider
4 Mr. Newkirk's status to be. I believe it was me who asked that
5 question. And Agent Deal advised then that Harvey Newkirk was
6 a subject.

7 THE COURT: And did Mr. Newkirk subsequently ask you
8 what was meant by that?

9 THE WITNESS: He did not. And the interview was over
10 at that point, so there weren't any other questions following
11 that statement.

12 THE COURT: What did you understand that statement to
13 mean?

14 THE WITNESS: Well, I understood that often at the
15 very beginning of an investigation, the government considers
16 anyone who might have information to be a subject, and there
17 are many subjects who are really closer to witnesses but the
18 government is not quite sure, so they will often call everyone
19 subjects, and then there are clearly subjects who are closer to
20 being a target. The statement that Mr. Newkirk was a subject,
21 while it was the first time they said it, it wasn't necessarily
22 alarming to me because the government often considers anyone
23 who has information as a subject.

24 I did subsequently have a conversation with
25 Mr. Newkirk, as I was walking him to the door, about his

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Newkirk - Redirect

1 status.

2 THE COURT: What did you say to him?

3 THE WITNESS: I said to him, Harvey, the last thing
4 the agent said is that you are a subject, and so -- they also
5 asked you about further interviews. I can give you names of
6 criminal defense lawyers to represent you. I am new to New
7 York, but I can get a list of names from Mr. Campriello.
8 Please let me know. We are happy to get you some names.

9 THE COURT: What did he say?

10 THE WITNESS: I think he just nodded his head and
11 said, Okay, thanks.

12 THE COURT: Did you then have a conversation that
13 evening with Mr. Alfieri?

14 THE WITNESS: I did. At the conclusion of the
15 interview, which I believe was somewhere between 7 and 7:30,
16 around 7:15, I probably went back to my office and checked to
17 see if Mr. Alfieri was still in the office, and he was, so I
18 went to his office and I told him what had occurred at the
19 meeting.

20 THE COURT: What did he say?

21 THE WITNESS: Well, he -- the discussion was fairly
22 long because I tried to recall everything that was said. There
23 was a discussion regarding what should be done with Harvey
24 Newkirk and I -- we discussed that it was too early to make any
25 judgments, that he should be placed on administrative leave and

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1 see how this comes out.

2 THE COURT: And that was prompted, was it not, by the
3 fact that he had been labeled a subject?

4 THE WITNESS: Yes, yes, it was. But I would say, I
5 would say, your Honor, that the word "subject" probably, to
6 Mr. Alfieri, sounds a lot more sinister than just to be told
7 initially, yes, you are a subject like anyone else who we may
8 get information from.

9 THE COURT: Now, subsequently, did you participate in
10 any conversations at the law firm with Mr. Newkirk?

11 THE WITNESS: Yes.

12 THE COURT: In general terms, what were those
13 conversations about?

14 THE WITNESS: The purpose of having a conversation
15 with Harvey Newkirk that I was involved in was to find out
16 exactly who our client was -- whether we had one client, two
17 clients, three clients -- and to be certain that we knew
18 exactly whose privilege it was that we were protecting because
19 we had been getting requests for documents from various people,
20 including our clients, and we wanted to make sure -- various
21 requests from people, including the person we thought was our
22 client. We wanted to make sure that we were turning over
23 appropriate documents to the appropriate people.

24 THE COURT: This being Reign and Darden or whoever?

25 THE WITNESS: Yes. There was a question of whether

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1 Bryan Cave's client was Calvin Darden, Sr., in his individual
2 capacity or Calvin Darden, Sr., in his capacity as the CEO of
3 the newly created entity Darden Media Group; whether it was
4 Reign Entertainment, whether it was Calvin Darden, Jr. There
5 were several parties that could have been considered our
6 clients, and it was very important, obviously, who exactly we
7 had the attorney/client privilege relationship with and then
8 whose consent we needed to turn over documents to parties who
9 were requesting them.

10 THE COURT: In those conversations, was there any
11 conversation about the firm's potential civil liability?

12 THE WITNESS: I'm not sure I understand your question,
13 your Honor. In which conversation?

14 THE COURT: In the conversations that you had that
15 Mr. Newkirk was part of subsequent to the February 12
16 conversation.

17 THE WITNESS: Yes, there was. Briefly during that
18 discussion we asked Harvey Newkirk questions regarding his view
19 of whether we represented Calvin Darden, Sr., personally, in
20 his personal capacity, for a variety of reasons or did we
21 represent him in his capacity as the head of the entity? And,
22 yes, so that was the nature of the discussion between myself
23 and Mr. Newkirk.

24 THE COURT: What I am trying to get at is -- all
25 right. Let's put Mr. Newkirk aside.

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Newkirk - Redirect

1 In the conversations that were had, we will say,
2 between February 12 and March 28, 2014, at the firm regarding
3 this matter generally, was there a concern about whether the
4 law firm would be sued?

5 THE WITNESS: I think that had to be an element of any
6 analysis of this. As you may know from the pleadings and
7 proceedings, there were allegations that Harvey Newkirk had
8 accepted service of a default judgment against Calvin Darden,
9 Sr., but then there were allegations that Harvey Newkirk said
10 that someone else was representing Calvin Darden, Sr., so we
11 were trying to figure out whether or not we represented Calvin
12 Darden, Sr., in connection with his personal guarantees or his
13 purported personal guarantees on the OpenGate loan and that is
14 a question that we were asking Harvey Newkirk because, yes, we
15 were concerned about Newkirk's acceptance of a default judgment
16 and failure to do anything about it.

17 THE COURT: In the conversations that you had after
18 February 12 with Mr. Newkirk, did you at any time repeat your
19 offer of getting him counsel or say anything about whether he
20 needed or should be considering separate counsel, anything of
21 that nature?

22 THE WITNESS: You know, I did not. However, the only
23 conversation I had with Harvey Newkirk following the February
24 12 meeting between the agents was approximately February 26,
25 and that was the day that Harvey came in to the office to talk

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1 about -- to really clarify exactly who our client is, and that
2 was the sole purpose of the questions; and, no, I did not
3 specifically repeat the statements that I made at the February
4 12 interview because I felt that they were so explicit, no need
5 to say anything more again. Also, it was not the type of
6 interview that you would be doing in connection with a company
7 employee coming in during the course of an internal
8 investigation, knowing that that information could later be
9 turned over. It wasn't a situation in which we believed the
10 *Upjohn* warnings were required. I had just said this two weeks
11 ago. It was clear and unequivocal, and it never occurred to me
12 that I needed to say the same thing again to a Columbia Law
13 School graduate.

14 THE COURT: Was there ever at any time, to your
15 knowledge, a discussion within the firm of whether Mr. Newkirk
16 had to be given *Upjohn* warnings or their equivalent beyond the
17 conversation you had had with him on February 12?

18 THE WITNESS: No, no.

19 THE COURT: Okay.

20 THE WITNESS: And, in fact, the February 12 meeting,
21 even then, that was Harvey Newkirk's meeting with law
22 enforcement that really had nothing to do with us. The only
23 reason that we were there was to make sure that Harvey could
24 answer their questions if he voluntarily chose to do so but
25 that he didn't inadvertently breach his ethical and

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1 professional obligations to protect the attorney/client
2 privilege, and so that's why we were there then. We did not
3 call Harvey in to go through an internal investigation of all
4 of the occurrences from start to finish and, because we were
5 not doing that, there was never a discussion of whether this
6 was required. It just appeared pretty clear that we were not
7 Harvey's counsel. We told him we weren't his counsel. No one
8 ever said that we were going to represent him. In fact, I
9 never met Harvey Newkirk before February 12, and I had only
10 seen him on one occasion, so it never occurred to anyone that
11 Harvey Newkirk would think that we represented him.

12 THE COURT: Now, there came a time when -- and I am
13 not clear whether you were involved in this or not, but you can
14 let me know -- the firm turned over some materials to the
15 United States Attorney's office, including materials or stuff
16 relating to Mr. Newkirk, yes?

17 THE WITNESS: Yes.

18 THE COURT: Were you privy to the decision to turn
19 that over?

20 THE WITNESS: I was. I recall that the government
21 made an initial informal request for information related to the
22 Maxim transaction. During that initial request, I believe it
23 took us some time to get the consent of the client to turn over
24 that information. I believe that there was also a subpoena
25 that was served upon the firm approximately a year ago

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1 requesting some additional information, and I did have a role
2 in reviewing the subpoena and helping to comply with it.

3 THE COURT: Was any conversation given to notifying
4 Mr. Newkirk that those materials were going to be turned over?

5 THE WITNESS: Not at all.

6 THE COURT: Why not?

7 THE WITNESS: Well, because the materials that were
8 requested were -- basically there was no purpose for the
9 government -- or for Bryan Cave to object to the production.
10 We were not representing Harvey Newkirk. We had initially
11 agreed to voluntarily provide some information to the
12 government. We believed that the government had every legal
13 right to conduct a criminal investigation, and we felt that we
14 had an obligation to cooperate and to turn over what the
15 government requested that we were legally obligated and legally
16 permitted to turn over.

17 THE COURT: I am going to let counsel first for
18 Mr. Newkirk and then for the government put whatever questions
19 they want to you. Thank you very much.

20 We will start with counsel for Mr. Newkirk, who needs
21 to identify himself for you.

22 MR. KENEALLY: Of course. Thank you, your Honor.

23 DIRECT EXAMINATION

24 BY MR. KENEALLY:

25 Q. Good afternoon, Ms. Buchanan. I am with the firm Harris,

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1 O'Brien, St. Laurent & Chaudhry, and I am here on behalf of
2 Mr. Newkirk. You can hear me just fine?

3 A. I can.

4 Q. Great. Thank you.

5 Ms. Buchanan, you said something just a couple of
6 moments ago about the events of February 12 and the interview
7 of Mr. Newkirk at the Bryan Cave offices, and I think you said
8 something along the lines of the interview had nothing to do
9 with us, referring to Bryan Cave. Do you remember saying that?

10 A. Yes.

11 Q. I would just like to clear a couple of things up.

12 How is it that the interview of Mr. Newkirk took place
13 at Bryan Cave's offices? Isn't it true that --

14 A. You know what? I don't know. I don't know why the
15 interview occurred there. As I stated a few minutes ago, I
16 learned about the interview late in the afternoon of February
17 12, and I was told that Harvey was going to talk with law
18 enforcement. I was told that the interview was occurring here.
19 I was told that Harvey Newkirk would likely be asked questions
20 regarding the Maxim transaction and that his truthful answers
21 to those questions could possibly breach attorney/client
22 privilege and that we did not want to stand in the way of
23 Harvey talking to law enforcement if that's what he wanted to
24 do, but we also didn't want to breach our ethical and
25 professional obligations to our client.

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1 Q. And was that information that you gained in a conversation
2 with Mr. Alfieri?

3 A. I believe so, yes.

4 Q. Mr. Alfieri didn't tell you that Mr. Newkirk had called him
5 and said, I have made an arrangement to have a meeting at our
6 offices, correct?

7 A. As I said, what I was told on the afternoon of February 12
8 was that there was going to be -- that Harvey Newkirk was going
9 to talk to law enforcement.

10 Q. So you didn't know whether law enforcement had contacted
11 Mr. Alfieri or contacted Mr. Dorman or contacted
12 Mr. Campriello, did you?

13 A. You know, I think by the time the interview occurred, it is
14 my recollection that there had been some earlier discussions
15 that took place that day, but I wasn't a party to them. But I
16 believe that there were some earlier discussions.

17 Q. And you didn't speak with the agents at all earlier,
18 correct?

19 A. You know, I am not certain of that. And I say this only
20 because when I was brought in to the discussion late in the
21 day, the concern was that, again, we did not want to stand in
22 the way of Harvey talking to the agents, but we also wanted to
23 make sure that he didn't breach the privilege. And I believe
24 that it was my suggestion that we talk to the agents about
25 letting us be there and make sure that somebody was there to

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1 protect the privilege. So because it was my idea, it is
2 possible that I asked somebody beforehand, but I honestly can't
3 remember whether it was me who asked whether we could be
4 present or whether it was someone else in the firm, but
5 clearly, knowing the way the government works, I don't think
6 that we just invited ourselves. I think that someone would
7 have asked, Can we be present to protect the privilege.

8 Q. And other than that discussion that you might possibly have
9 had with the agents, you didn't have any other discussions with
10 the agents prior to the interview, is that correct?

11 A. I don't think I did.

12 Q. And do you know who -- have you ever heard the name James
13 Pastore, Ms. Buchanan?

14 A. Yes, I have.

15 Q. Who is Mr. Pastore?

16 A. He was an Assistant U.S. Attorney in the Southern District
17 and he was the original assistant who was in charge --
18 overseeing the investigation.

19 Q. And did you speak with Mr. Pastore on the afternoon of
20 February 12, 2014, prior to Mr. Newkirk's interview?

21 A. I don't -- I don't specifically recall that. As I said, it
22 is possible that it was me who asked if we could be present,
23 but I don't specifically recall. I know I have had
24 conversations with Assistant U.S. Attorney Pastore. I don't
25 recall whether I had one on February 12 prior to the interview.

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1 Q. And just to be clear, before the interview began, you were
2 aware that Calvin Darden, Jr., had already been arrested,
3 correct?

4 A. That's correct.

5 Q. Before the interview began on the 12th of February, 2014,
6 were you aware of whether or not Calvin Darden, Jr., was a
7 client of Bryan Cave's?

8 A. On the afternoon of February 12, 2014, as it was explained
9 to me, Bryan Cave's client was the Darden Media Group.

10 Q. And did you have an understanding on that afternoon as to
11 whether Calvin Darden, Jr., was part of the Darden Media Group?

12 A. My understanding on that afternoon was that Calvin Darden,
13 Jr., was somehow involved in the transaction, but that he was
14 not in a management role of the Darden Media Group; that the
15 Darden Media Group was controlled by Calvin Darden, Sr.; that
16 our client was likely Calvin Darden, Sr. in his capacity as
17 chair of the Darden Media Group, as well as the Darden Media
18 Group. I did not believe on February 12, 2014, that Calvin
19 Darden, Jr., was a client of Bryan Cave.

20 Q. You did not believe that at that time?

21 A. Well, let me say this again. I didn't believe it on
22 February 12, 2014, nor did I believe it at any time subsequent
23 to that date.

24 Q. But you did know that he was somehow involved in the Maxim
25 transaction?

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1 A. Yes.

2 Q. And you obviously knew that he was Calvin Darden, Sr.'s
3 son?

4 A. Yes.

5 Q. On February 12, 2014, as you sat in at that interview,
6 Ms. Buchanan, whom were you representing?

7 A. I was representing the Darden Media Group and I was
8 protecting the attorney/client privilege that the Darden Media
9 Group had with Bryan Cave. I also believed that Harvey Newkirk
10 was -- still had the obligation to protect the attorney/client
11 privilege of Darden Media Group, and I told him that.

12 Q. Did anyone from Darden Media Group ask you to represent its
13 interests at that interview?

14 A. No.

15 Q. And in fact, as of February 12, you didn't have a certainty
16 as to whom Bryan Cave's client was with respect to the Maxim
17 transaction.

18 A. Well, on February 12, 2014, I believed that our client was
19 the Darden Media Group, and I know that we cannot disclose
20 privileged information to anyone without the client's consent.
21 This all happened very quickly. I knew that that privilege had
22 to be protected; and, no, I wasn't asked to do it, meaning I
23 was asked to do it by Bryan Cave. No, I wasn't asked to do it
24 by the client, but every lawyer knows we have that obligation.

25 Q. Before the interview began on the 12th, you had no

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1 conversations in private whatsoever with Mr. Newkirk, is that
2 correct?

3 A. That is correct.

4 Q. So before the meeting began on the 12th, you did not tell
5 Mr. Newkirk of his duty to honor the attorney/client privilege
6 between Bryan Cave and Darden Media Group, is that correct?

7 A. On February 12 I did, yes. When Harvey Newkirk walked into
8 the room, Harvey Newkirk was introduced to me for the very
9 first time. I turned to Harvey Newkirk and, again, I
10 reintroduced myself and said that I was here not in the role of
11 his counsel, but I was here on behalf of Bryan Cave, to protect
12 the attorney/client privilege that we had with our client, the
13 Darden Media Group. I also reminded him that as a lawyer at
14 Bryan Cave he, too, had the continuing obligation to protect
15 the attorney/client privilege and that the agents had agreed to
16 allow me to be present at the meeting to assist him in
17 protecting our client's privilege. I told Harvey that I didn't
18 know a lot about the transaction, and that I certainly would --
19 if he thought that a question was going to breach the
20 privilege, by all means, please speak up and tell them. If he
21 isn't sure, he should ask me, we can step out of the room. If
22 I am not sure, I may ask him and we will step out of the room.
23 But the agents understand that we have that legal duty and they
24 understand those ethical and professional obligations, and they
25 are going to let us do that. If there is a dispute about

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1 whether something is privileged or not, they had agreed in
2 advance that they would just table the question until some
3 determination could be made.

4 Q. And this conversation that you just described to us took
5 place in the presence of the agents in that conference room at
6 Bryan Cave, correct?

7 A. Yes.

8 Q. And you had no conversation with Mr. Newkirk about any
9 details of the Maxim transaction to further familiarize
10 yourself with possible issues or facts relating to
11 attorney/client privilege that might arise, is that correct?

12 A. From my perspective, Mr. Keneally, I know that if a
13 communication occurs between a lawyer and the client and it is
14 not outside, that communication is privileged. I also know
15 that if there are communications that extend beyond the lawyer
16 and the client, those are no longer privileged because they
17 have been disclosed to third parties. So, as I was saying, the
18 reason that I didn't know everything about the transaction is
19 that I knew that there might be certain documents that,
20 although discussed between an attorney and the client, might
21 also have been disclosed to third parties, which would
22 therefore then make them no longer privileged.

23 So those were the kinds of questions and things that I
24 might have needed to ask Harvey about, because I wasn't sure
25 with respect to all the documents in the case whether certain

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1 documents were just between Bryan Cave and the client or may
2 have gone to other parties.

3 Q. I understand that, Ms. Buchanan, and I don't want to
4 belabor this point too much, but I am just a little puzzled
5 because it seems to me, on the one hand, this was an
6 understandably crucial issue to Bryan Cave, a crucial issue to
7 whomever Bryan Cave's client turned out to be, and a crucial
8 issue to Mr. Newkirk, and you didn't have any preparatory
9 conversations with Mr. Newkirk prior to letting him go in and
10 speak for two and a half hours to government agents, and I just
11 don't understand what the thought process was behind that.

12 MR. ADAMS: Objection.

13 THE COURT: Excuse me. The government just raised an
14 objection and, Mr. Keneally, great as my respect is for you, I
15 was searching, I think in total vain, for a question in that
16 long soliloquy in which you just engaged, so the objection is
17 sustained.

18 But, Ms. Buchanan, I have a question, which is, I
19 think you said a minute ago that when you had that initial
20 conversation, after first meeting Mr. Newkirk and you were
21 explaining to him why you were there, that you specifically
22 said you were not representing him. Did I hear that correctly?

23 THE WITNESS: That's correct. Because I certainly did
24 not want him to have that impression. And the agents
25 understood that I was not there to represent him. I was not

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1 going to oppose any of their questioning but for to protect the
2 attorney/client privilege. Harvey Newkirk didn't at any time
3 ask me anything. He didn't ask me to represent him. He didn't
4 ask me if he should continue. There wasn't any discussion
5 other than with regard to the attorney/client privilege
6 questions and looking at documents and determining whether
7 those documents could be privileged.

8 MR. KENEALLY: Thank you, your Honor.

9 BY MR. KENEALLY:

10 Q. Ms. Buchanan, I want to be clear on a couple of other
11 things.

12 You knew before the interview that Mr. Darden, Jr.,
13 had been arrested earlier that day?

14 A. That's correct.

15 Q. And you knew that he was involved in this transaction?

16 A. That's correct.

17 Q. And you knew that the agents were moving quickly and were
18 seeking to speak to an attorney from your firm who had an
19 integral role in that transaction?

20 A. That's correct.

21 Q. And you knew that this was a serious matter for the firm
22 and Mr. Newkirk beyond simple attorney/client privilege issues,
23 is that correct?

24 A. Yes.

25 Q. And, with all that, you didn't ask about Mr. Newkirk's

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1 status in the investigation until the end of his interview, is
2 that correct?

3 A. I did not ask the agents any questions about Mr. Newkirk
4 because I was not representing him.

5 THE COURT: Why did you ask at the end?

6 THE WITNESS: Well, the interview was over and I --
7 I -- I felt that the interview had gone really well for
8 Mr. Newkirk. I felt that he answered all the questions. I
9 didn't think that there was anything that he had to be concerned
10 about at all, and I really was expecting them to say, well, he
11 is a witness and we want to get more information from him. So
12 that's why I asked.

13 THE COURT: All right. Mr. Keneally, anything else?

14 BY MR. KENEALLY:

15 Q. A couple of questions about your conversation later that
16 night with Mr. Alfieri in which you told Mr. Alfieri that
17 Mr. Newkirk was a subject of the investigation. You have
18 explained to us here today that that subject, the word
19 "subject" encompasses a rather wide definition under criminal
20 defense terminology and that it often includes people who don't
21 really have realistic criminal exposure. Do you remember
22 explaining that to us?

23 A. Yes, absolutely.

24 Q. Did you explain that to Mr. Alfieri and try to tell
25 Mr. Alfieri that Mr. Newkirk was closer to the witness end of

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1 the spectrum than the target end?

2 A. You know, I don't recall whether we had that conversation
3 that night. I think at some point we probably did. The
4 substance of the conversation with Mr. Alfieri that evening
5 really had to do with telling him what had happened and helping
6 him make a firm decision on what to do with Mr. Newkirk. And
7 as I also said earlier, from my view of that evening, I didn't
8 think that Harvey had any concern. I thought that Harvey, at
9 worst, was duped by this Darden, Jr., and so I thought and
10 advised that let's just put him on leave and let's wait and see
11 how this shakes out. Don't unfairly judge the guy.

12 Q. During the interview, did you have any conversations with
13 Mr. Newkirk outside the conference room?

14 A. I believe that there were -- there was at least one and
15 possibly two times that we stepped out of the interview room.
16 I think that on one occasion I asked him to step out because I
17 had a question about maybe the documents that they were -- the
18 agents were questioning him about, and I think maybe on one
19 question Harvey wanted to ask me something. But both questions
20 were related to whether it was okay for him to answer the
21 question without breaching the attorney/client privilege.

22 Q. Do you recall him asking to step out and asking you a
23 question about a statute that had been mentioned by the agents?

24 A. I don't believe so, no.

25 Q. You know what a 1001 warning is, don't you, Ms. Buchanan?

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1 A. Yes, I do.

2 Q. Was Mr. Newkirk given a 1001 warning at the beginning of
3 his interview?

4 A. You know, I think, yeah, I believe that he was. I think
5 that was that it was the -- you know, the agent asked him if he
6 was willing to proceed and that this was voluntary and that he
7 understood that even -- that Newkirk understood that even
8 though this was voluntary, that he had an obligation to answer
9 the questions, you know, truthfully. I don't specifically
10 remember the agent saying 1001, but I think that, from my
11 recollection, that the things I remember are that the agent
12 told him -- asked him if he was willing to proceed and saying
13 that it was voluntary but reminding him that even if it is
14 voluntary, you have to answer truthfully. That's what I
15 recall.

16 Q. Would you have memorialized that in a memo?

17 A. You know, I didn't, because the purpose of my memo was to
18 try to sort of recite what were the things that were asked
19 really as best as I could to get the sense of what occurred at
20 the meeting, and I am sure you have seen that the time stamp on
21 this is after 1 in the morning, so I made every effort to do it
22 that evening, to make sure that I did the best job I could to
23 memorialize what occurred and what I thought was important at
24 the time.

25 Q. Just to be clear, we have a book of government exhibits

F812newH

Buchanan - Direct

1 here. Have you been provided with any government exhibits
2 prior to this hearing?

3 A. Yeah, I have two exhibits in front of me. One is labeled
4 Government Exhibit 4, which is my memorandum from the February
5 12 interview; and then I have another one in front of me marked
6 Government Exhibit 8, which is a series of e-mail
7 communications between Bryan Cave and attorneys from Alston &
8 Bird, and it is 15 pages.

9 Q. Do you say anywhere in your memo, in Government Exhibit 4,
10 that you offered to provide Harvey Newkirk with a list of
11 defense counsel?

12 A. No, I didn't; and, again, as I said, you know, the
13 interview was over, I was walking Harvey to the elevator and,
14 as a friendly gesture, I said to him, you know, they said that
15 you were a subject, and if you need some recommendations for
16 counsel moving forward, I don't -- I am happy to get you some
17 names if you want them. Just give me a call.

18 Q. So you just said that in passing on the way to the
19 elevator?

20 A. On the way to the elevator, yes. And that was -- the only
21 conversations I had with Harvey on February 12 were during the
22 agents' interview, the two times that we stepped outside the
23 interview room, and as I walked him to the door of the
24 elevator. I then did not speak to Harvey again until February
25 26, and then after that I never saw or spoke to Harvey Newkirk

F812newH

Buchanan - Direct

1 again.

2 Q. Thank you. I have only a couple more questions, a couple
3 of questions about February 12.

4 It is a fact, is it not, Ms. Buchanan, that
5 Mr. Newkirk's interview on the 12th was not scheduled by
6 Mr. Newkirk, but was scheduled by Bryan Cave?

7 A. I don't know the answer to that.

8 Q. Ms. Buchanan, as a highly experienced criminal defense
9 attorney, in your opinion is it the best practice to allow
10 someone who turns out to be a subject of a criminal
11 investigation to walk unprepared and unrepresented into an
12 interview with government agents after a client of his has been
13 arrested?

14 MR. ADAMS: Objection.

15 THE COURT: The objection is sustained, as I am sure
16 Mr. Keneally knew it would be, but he felt he wanted to end his
17 questioning on a rhetorical point.

18 MR. KENEALLY: Your Honor, if I might I have one or
19 two non-rhetorical questions to ask of Ms. Buchanan.

20 THE COURT: Okay.

21 Q. This has to deal with, you are subsequently speaking to
22 Mr. Newkirk on or about the 26th of February, and the purpose
23 of those discussions was, as you stated, to figure out who
24 Bryan Cave's clients were, is that correct?

25 A. That's correct.

F812newH

Buchanan - Direct

1 Q. And the reason you were trying to figure that out is
2 because Bryan Cave was in discussions with lawyers from the
3 firm of Alston & Bird, correct?

4 A. Well, there were two reasons that we were trying to figure
5 it out. We were trying to figure it out because lawyers from
6 Alston & Bird wanted their file, they wanted their records, and
7 I believe that the government had also asked us for some
8 records and we couldn't even begin to consider turning anything
9 over to anyone until we were certain that we knew whose records
10 they were.

11 Q. And Alston & Bird at the time was representing Calvin
12 Darden, Sr., is that correct?

13 A. That is correct.

14 Q. And you spoke to Harvey Newkirk for the purposes of being
15 able to speak to Alston & Bird, correct?

16 A. Not for the purposes of being able to speak to them, but
17 for the purposes of clarifying exactly who our clients were and
18 in what capacity we represented them. And so it was important
19 to make sure that we were absolutely clear about that.

20 Q. When you interviewed Mr. Newkirk on or about February 26,
21 did you tell him that you would divulge to Alston & Bird
22 whatever he told you that day?

23 A. At the time I met with Harvey Newkirk on February 26, it
24 wasn't an interview, it wasn't an interrogation. It was a
25 meeting, it was a discussion, it was a "help us figure out who

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Buchanan - Direct

1 our clients were, what documents do we have memorializing that,
2 are you absolutely sure, does the line change at any point?"

3 He knew that the purpose for which we needed to figure that out
4 ASAP is that our client needed the records to get the default
5 judgment lifted. He knew that time was of the essence because
6 a default judgment had been entered against I believe it was
7 Calvin Darden, Sr., personally. So, yeah, Harvey knew that we
8 needed this information to be able to give our client back its
9 records.

10 Q. And following your meeting with Mr. Newkirk on the 26th,
11 Bryan Cave did in fact tell Alston & Bird what Mr. Newkirk had
12 told Bryan Cave, correct?

13 A. I am not sure what you mean by did we tell them what Harvey
14 told us. I don't know what you mean by that.

15 Q. Well, with respect to the representation of Calvin Darden,
16 Sr., Mr. Newkirk provided you information on February 26,
17 correct?

18 A. That is correct.

19 Q. Did you pass that information on to Alston & Bird?

20 A. Yes.

21 MR. KENEALLY: Your Honor, may I just have one more
22 moment?

23 THE COURT: Yes.

24 (Counsel confer)

25 BY MR. KENEALLY:

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Buchanan - Direct

1 Q. Just one more thing here. You, Ms. Buchanan, have spoken
2 to government agents and to assistant U.S. Attorneys?

3 A. In this case?

4 Q. Yes.

5 A. Yes.

6 Q. And you have divulged to the government things that Harvey
7 Newkirk has told you, correct?

8 A. Some things, yes.

9 Q. And you are aware that other Bryan Cave attorneys have
10 spoken to the government and have told the government things
11 that Harvey Newkirk has told them, correct?

12 A. That's correct.

13 Q. And Bryan Cave has provided to the government
14 communications that it has had with Harvey Newkirk, correct?

15 A. You are going to have to be more specific than that,
16 please.

17 Q. Well, you have responded to government subpoenas, correct?

18 THE COURT: Are you talking now about like written
19 communications as opposed to oral?

20 MR. KENEALLY: Yes, your Honor.

21 A. We have provided the government, in response to first their
22 informal request for documents, as well as in response to the
23 subpoena, we have provided various e-mail communications from
24 Harvey Newkirk. So, yes, we have provided the government with
25 communications from Harvey Newkirk.

F812newH

Buchanan - Cross

1 MR. KENEALLY: Thank you. No further questions, your
2 Honor.

3 THE COURT: Anything from the government?

4 MR. ADAMS: Just very briefly, your Honor.

5 On the basis of the questions and answers of
6 Government Exhibit 4, I would offer that exhibit.

7 THE COURT: Exhibit 4 is received.

8 (Government's Exhibit 4 received in evidence)

9 MR. ADAMS: Similarly, with respect to Government
10 Exhibit 8 on the basis of --

11 THE COURT: Exhibit 8 is received.

12 MR. ADAMS: Thank you.

13 (Government's Exhibit 8 received in evidence)

14 CROSS EXAMINATION

15 BY MR. ADAMS:

16 Q. Ms. Buchanan, at the February 26 meeting with Mr. Newkirk
17 that you have described, during that meeting, what, if
18 anything, did Mr. Newkirk tell you about any prior meetings
19 with law enforcement that he had attended at which you were not
20 in attendance?

21 A. During the February 26, 2014, meeting, I didn't have any
22 discussions with Harvey Newkirk about any meetings with law
23 enforcement. I didn't know what contacts he had had with law
24 enforcement. He didn't tell me anything about any contacts he
25 may have had with law enforcement.

F812newH

Buchanan - Cross

1 Q. When, if ever, has Harvey Newkirk asked you for legal
2 advice in his personal capacity?

3 A. Harvey has never asked me for legal advice.

4 MR. ADAMS: Nothing further.

5 THE COURT: All right. Thank you so much. We will
6 hang up now. Thanks again.

7 THE WITNESS: Thank you, your Honor.

8 THE COURT: We will take a brief recess.

9 (Recess)

10 THE COURT: I was feeling a little guilty of the hard
11 time I gave Mr. Silverman. On other hand, being Jewish, I
12 really enjoy feeling guilty.

13 So, at any rate, let's get Mr. Campriello.

14 AUSTIN CAMPRIELLO,

15 having been duly sworn, testified as follows:

16 THE COURT: Mr. Campriello, we are sorry we had to
17 detain you so long because I understand you are involved in a
18 trial right now.

19 THE WITNESS: Yes, sir.

20 THE COURT: In this court?

21 THE WITNESS: No, the Dewey LeBoeuf case in State
22 Supreme.

23 THE COURT: Well, there are tons of lawyers in that
24 case. They can carry on as best they will. Besides which, my
25 understanding is that trials were extinct. I am very surprised

F812newH

Buchanan - Cross

1 there even is a trial these days.

2 Let's get down to business.

3 There came a time when you convened or were present at
4 a meeting on February 12, 2014, involving two agents and
5 Mr. Newkirk, true?

6 THE WITNESS: Yes. Not convened, but was present.

7 THE COURT: How did that meeting come about?

8 THE WITNESS: Earlier that day, three of my partners
9 came to my office -- Vincent Alfieri, Jay Dorman, Noah
10 Weissman -- and told me about problems or a problem that had
11 arisen in a matter that Mr. Newkirk had been working on. I
12 don't remember the nature of what they told me, but there
13 clearly was a problem in the transaction on which he was
14 working.

15 On top of that, I learned that a federal agent had
16 contacted somebody there, probably Mr. Alfieri, because he is
17 the managing partner, but I don't know that; and I then,
18 because I was one of the criminal lawyers in the New York
19 office, called the federal agent, so we must have had his name
20 and number, spoke to him, and whatever I said triggered what
21 often happens when I call a federal agent, and that is, you
22 have to speak to the assistant.

23 THE COURT: Go ahead.

24 THE WITNESS: I think the assistant called us back. I
25 don't think I called the assistant. But I did speak to either

F812newH

Buchanan - Cross

1 an assistant or two assistants on the phone, and I think
2 Mr. Alfieri was with me at the time.

3 THE COURT: Roughly what time of day was this?

4 THE WITNESS: Probably in the middle of the day
5 because the meeting that happened later was in the later part
6 of the afternoon is my recollection.

7 THE COURT: Had you learned in these earlier
8 conversations that there had been an arrest?

9 THE WITNESS: I don't remember.

10 THE COURT: Go ahead.

11 THE WITNESS: During the call with the assistants --
12 and I am going to say "assistants" even though I am not sure
13 there were two -- I said to them that Bryan Cave wanted to be
14 completely cooperative with the United States government, but
15 that they had to understand that, depending upon what they
16 wanted, Bryan Cave might have to assert privilege to protect
17 its client. By "its client," I am not talking about
18 Mr. Newkirk. I am talking about whoever or whatever entity or
19 human beings Mr. Newkirk had been working for. I didn't want
20 the agent -- excuse me, the assistants to think that, by
21 asserting a privilege, we were using that as sort of an excuse
22 for not being cooperative. I wanted to make sure that they
23 knew that the law firm wanted to cooperate with federal law
24 enforcement, but that we would have an ethical obligation,
25 depending upon what they were asking us to do, to protect the

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Buchanan - Cross

1 client's privilege.

2 THE COURT: So what happened next?

3 THE WITNESS: What I remember next is there was a
4 meeting that same day, later in the day, in a conference room
5 in Bryan Cave. I know I was present. I know Ms. Buchanan was
6 present. I believe there were two agents present. There may
7 have been an assistant. I don't remember. Before --
8 Mr. Newkirk eventually came, but before Mr. Newkirk came, I
9 believe that I, in essence, reiterated again what I just said,
10 namely, we want to be cooperative, but if we have to assert
11 privileges, we are going to have to do it because that is our
12 ethical obligation. That's before Mr. Newkirk came.

13 THE COURT: I understand. In these earlier
14 conversations, is it your recollection that the agents or the
15 assistants were seeking to get information from Bryan Cave?

16 THE WITNESS: Yes, but I don't remember what.

17 THE COURT: And was the decision to have the meeting
18 at Bryan Cave something you suggested? I mean, it could have
19 been at the office of the U.S. Attorney's office, whatever.
20 How did it come about?

21 THE WITNESS: I don't remember. I don't remember.

22 THE COURT: Okay.

23 Do you remember what, if anything, you said to
24 Ms. Buchanan before Mr. Newkirk arrived?

25 THE WITNESS: I left something out and I am glad you

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Buchanan - Cross

1 asked me that. I left something out. Between -- I believe it
2 was -- it was clearly before this meeting, but I think it was
3 between the meeting -- the telephone call with the assistant or
4 assistants and that meeting, I spoke with Ms. Buchanan and I
5 told her what had happened earlier. That happened.

6 THE COURT: Why was she going to be there?

7 THE WITNESS: Ms. Buchanan was a relatively newcomer
8 to our office. She obviously is a criminal lawyer. She had
9 been the U.S. Attorney in the Western District of Pennsylvania.
10 She was the person who was going to deal with this. I wasn't
11 going to deal with this.

12 I was going to be there at the beginning of the
13 meeting to reiterate to the agents where Bryan Cave was coming
14 from. I wanted to make sure that when Mr. Newkirk arrived that
15 Ms. Buchanan made clear that we were not representing him; that
16 we were going to be there -- and when I say "we," I really mean
17 her -- we were going to be there to protect the underlying
18 client's privilege, so that's why I was there.

19 And then, as Mr. Newkirk came in with, I think,
20 Mr. Alfieri, after we had been there for a while, Ms. Buchanan
21 basically said to everybody in the room, so that we all started
22 out on the same playing field, that she was there to protect
23 the underlying client's privilege, and I got up and left. I
24 don't think I was in the room with Mr. Newkirk for more than a
25 minute, two minutes tops.

F812newH

Buchanan - Cross

1 THE COURT: Did she say, if you recollect one way or
2 the other, I am not representing Mr. Newkirk or anything like
3 that?

4 THE WITNESS: I believe she did.

5 THE COURT: Why was that said in front of the agents
6 as opposed to calling Mr. Newkirk out of the room and saying, I
7 want you to understand before we go in here that we are not
8 representing you or something like that? Why was that done in
9 this sort of --

10 THE WITNESS: Probably so that everybody heard it
11 simultaneously and so that there was no side conversation.
12 That's what I am thinking. She obviously will tell you
13 whatever she was thinking or has told you.

14 THE COURT: So then you left.

15 THE WITNESS: Yes.

16 THE COURT: Subsequent to that, did you have any
17 further conversations, either in person or by telephone or by
18 e-mail, any form of communication with Mr. Newkirk?

19 THE WITNESS: I don't believe I ever had any
20 communication whatsoever with Mr. Newkirk until about two
21 minutes ago, when we almost bumped into each other in the men's
22 room and, I think he said something like "excuse me" or "I am
23 sorry."

24 THE COURT: I think we will hear the next questions
25 from Mr. Newkirk's counsel.

F812newH

Campriello - Direct

1 DIRECT EXAMINATION

2 BY MS. CHAUDHRY:

3 Q. Good evening, Mr. Campriello. I am Priya Chaudhry. I
4 represent Harvey Newkirk.

5 A. Hello.

6 Q. You are a former prosecutor, correct?

7 A. Yes.

8 Q. And you are a criminal defense lawyer now?

9 A. Yes.

10 Q. For how many years have you been a criminal defense lawyer?

11 A. I have been --

12 THE COURT: Remember, you are under oath.

13 A. I have been a lawyer for almost 44 years, and I did two
14 stints in government, so I would say roughly 34 years, but
15 broken up.16 Q. You referred to yourself as the criminal lawyer in the New
17 York office of Bryan Cave at the time, right?18 A. Well, I was one of them, because Ms. Buchanan had joined
19 us.

20 Q. Prior to that, were you the criminal defense lawyer?

21 A. Yes. I had associates who worked with me, but I was the --
22 yes, I was the criminal defense lawyer.

23 Q. You have run internal investigations, haven't you?

24 A. Yes.

25 Q. And you have represented companies in the past, haven't

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Campriello - Direct

1 you?

2 A. Yes.

3 Q. You have given *Upjohn* warnings to employees of the
4 companies you have represented, haven't you?

5 A. Yes.

6 Q. You have done this in writing previously, haven't you?

7 A. Yes.

8 Q. And when you have represented a company in the past, you
9 have referred employees of that company to their own lawyers,
10 haven't you?

11 A. Yes.

12 Q. How many times do you think you have done that in these 34
13 years?

14 A. Many. It's hard to quantify, but many.

15 Q. And you have represented people who were asked by the
16 government to meet with the government, haven't you?

17 A. Yes.

18 Q. And in those cases, you met with your client prior to the
19 meeting with the government, didn't you?

20 A. With my client, yes.

21 Q. And you prepared your client?

22 A. Yes.

23 Q. You spoke with the government apart from your client,
24 correct?

25 A. Yes.

F812newH

Campriello - Direct

1 Q. You asked what the person's status is in the investigation?

2 A. Yes.

3 Q. And you asked the government -- you have asked the
4 government what the government would want to know from your
5 client?

6 A. Yes, I have asked.

7 Q. Sometimes they don't tell you, correct?

8 A. Often they don't tell me but, yes, I have asked.

9 Q. And after that you speak with your client again, after
10 learning some information from the government, correct?

11 A. Yes.

12 Q. And you explain the criminal process to your client,
13 correct?

14 A. Yes.

15 Q. Have you represented a lawyer in the past?

16 A. I am representing a lawyer now, but "in the past," you mean
17 prior to this situation?

18 Q. In your 34 years, not including this hearing today, have
19 you ever represented a lawyer?

20 THE COURT: He is representing somebody in the Dewey
21 trial right now.

22 A. Yes.

23 THE COURT: Who do you represent?

24 THE WITNESS: Stephen DiCarmine, who was the executive
25 director.

F812newH

Campriello - Direct

1 Q. Even though you were representing a lawyer, you did explain
2 the criminal process to that lawyer, didn't you?

3 A. You are talking about my current representation --

4 Q. I don't want to go into your current representation, but
5 regardless of whether your client is a lawyer or nonlawyer, you
6 would explain the criminal process?

7 A. Yes.

8 Q. And you explain the consequences to your client of meeting
9 with the government, don't you?

10 A. Yes.

11 Q. And you let the client make the decision of whether or not
12 to have that meeting, correct?

13 A. Yes.

14 Q. You thoroughly interview your clients, before you take them
15 in, to understand your client's exposure, correct?

16 A. Yes.

17 Q. And in the past you have decided not to take certain
18 clients in to meet with the government, haven't you?

19 A. Yes.

20 Q. It is not your practice to meet a new client in the United
21 States Attorney's office in a conference room as a meeting
22 begins, is it?

23 A. No.

24 Q. And it is not your practice to tell someone that you are
25 not representing that they should meet with the government

F812newH

Campriello - Direct

1 without a lawyer, is it?

2 A. No.

3 Q. You would tell that person you were not representing to get
4 a lawyer, wouldn't you?

5 A. Do that one again. Ask me that again, please.

6 Q. If someone who is not your client asked you if they should
7 speak with a federal agent, wouldn't you recommend that person
8 get a lawyer?

9 A. You know, I would think about it, because I attended a CLE
10 program that I think was in this building many years ago where
11 there was a difference on the panel as to whether it is always
12 permissible to say, Get a lawyer, or whether you are supposed
13 to say, I can't give you that advice.

14 Q. Would you offer to refer someone to a lawyer if they told
15 you that federal agents wanted to speak with them?

16 A. I probably would. Well, it would depend on the
17 circumstances. Under certain circumstances I think I would,
18 and under other circumstances I might not.

19 Q. There are circumstances in which you would not recommend
20 that someone speak to a lawyer before speaking to --

21 THE COURT: I think we are getting very far away from
22 the facts of this case. You are just asking him to in the
23 abstract --

24 MS. CHAUDHRY: I was just about to focus here, so I
25 will divert.

F812newH

Campriello - Direct

1 THE COURT: Okay.

2 Q. I want to turn your attention to February 12, 2014. You
3 said that's the first time you heard of the investigation here?

4 A. No. I said that's the first time that I remember something
5 happening. I can't say for certain that I didn't know
6 something about the underlying matter earlier, but I think that
7 was the first time I learned of any federal interest in it.

8 Q. And you were not previously involved in the Maxim deal,
9 were you?

10 A. In the what?

11 Q. The Maxim deal.

12 A. I don't know the name of the deal, so no.

13 Q. And you did not know Harvey Newkirk prior to that day?

14 A. I knew Harvey Newkirk in the following sense: Our New York
15 office has periodic partner/counsel lunches. I was at one of
16 those, and Mr. Newkirk was introduced as a new counsel in the
17 firm. He spoke briefly about whatever it is that he does, and
18 so I knew Mr. Newkirk to that extent before that day. I don't
19 think that, from that introductory experience until that day, I
20 don't believe he and I ever had any communication whatsoever.

21 THE COURT: The close collegiality of modern law firms
22 is certainly a wonder to behold.

23 Q. Previous to February 12, no one at the law firm, including
24 Mr. Newkirk, had consulted you on any privilege issues, did
25 they?

F812newH

Campriello - Direct

1 A. Certainly Mr. Newkirk had never consulted me on any
2 privilege issue, and I don't remember anybody else doing it
3 either.

4 Q. And no one at the firm consulted you on the potential
5 litigation involved from the Maxim deal, did they?

6 A. I have no recollection of anything like that happening.

7 Q. But you recalled when the federal agents called, correct?

8 A. Yes.

9 Q. And you called -- I'm sorry. I think you said the federal
10 agents may have called Vinnie Alfieri, correct?

11 A. Frankly, I shouldn't have said that. I did say it. That
12 was a supposition on my part, that he would be the person they
13 contact. I don't know who they contacted.

14 Q. They didn't contact you, did they?

15 A. No.

16 Q. And you learned that they wanted to speak to Harvey
17 Newkirk, correct?

18 A. I must have learned it at some point during that day.

19 Q. When you called the federal agents, you were calling on
20 behalf of Bryan Cave and Harvey Newkirk, weren't you?

21 A. No.

22 Q. You were not calling on behalf of Bryan Cave?

23 A. On behalf of Bryan Cave, yes; on behalf of Harvey Newkirk,
24 no.

25 Q. You set up a meeting between the federal agents and Harvey

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Campriello - Direct

1 Newkirk, didn't you?

2 A. I'm not sure I was the one who set it up.

3 Q. You were the one speaking on behalf of your law firm with
4 both the U.S. Attorney's office and the federal agents, weren't
5 you?

6 A. I was speaking on behalf of my law firm with them.

7 Mr. Alfieri I believe was on at least one of those calls with
8 me.

9 Q. Was Mr. Newkirk on any of the calls during which the
10 meeting was being set up?

11 A. Not with me.

12 Q. Did you tell the agents to call Harvey Newkirk directly to
13 set up a meeting with them?

14 A. No.

15 Q. Did you call Harvey Newkirk before he came in to that
16 conference room and tell him that federal agents have called
17 and want to speak to him?

18 A. No.

19 Q. Did you call Harvey Newkirk and tell him that his -- that
20 Calvin Darden, Jr., had just been arrested?

21 A. No.

22 Q. Are you aware of anyone that day telling Harvey Newkirk
23 that federal agents had asked to speak to him?

24 A. I don't know one way or the other.

25 Q. You said this call happened in the mid afternoon, right?

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Campriello - Direct

1 A. No. I said the conference happened, I believe, at some
2 point in the afternoon. I think I said that the call happened
3 in the middle of the day sometime. Could be a little bit in
4 the morning, could be a little bit in the afternoon.

5 Q. How much time do you think elapsed between the discussion
6 that there would be a meeting with Harvey Newkirk and the
7 actual meeting with Harvey Newkirk?

8 A. I can give you a guesstimate.

9 Q. Okay.

10 A. Two hours, three hours, four hours. Assuming one happened
11 around noon, I think the other one happened in the latter part
12 of the afternoon, middle to latter part of the afternoon.

13 Q. And in those three or four hours, there were discussions
14 within Bryan Cave of what to do, correct?

15 A. I know I talked with Ms. Buchanan about what had happened
16 earlier, yes.

17 Q. And you called, you think, at least one assistant, maybe
18 two, to speak about this?

19 A. It was one conversation and there may have been two of them
20 on the phone.

21 Q. I see. And you wanted to make clear that Bryan Cave was
22 going to be 100 percent cooperative, correct?

23 A. Yes.

24 Q. That was the purpose of your call?

25 A. Yes.

F812newH

Campriello - Direct

1 Q. And then you did speak to other people at Bryan Cave who
2 had more information about the substance of this deal, correct?

3 A. That was in the first meeting that I had with
4 Messrs. Alfieri, Dorman, and Weissman.

5 Q. And then you spoke with Mary Beth Buchanan?

6 A. Yes.

7 Q. Again, she is a criminal partner at your firm, correct?

8 A. Yes.

9 Q. You didn't prep Harvey Newkirk before his meeting with the
10 government, did you?

11 A. No.

12 Q. And you didn't speak to him before his meeting with the
13 government?

14 A. No.

15 Q. You didn't give him the names of any criminal lawyers he
16 should contact before his meeting with the government, did you?

17 A. No.

18 Q. Did you tell Mary Beth Buchanan to call Harvey Newkirk in
19 preparation for the meeting that he was going to have that
20 afternoon?

21 A. No.

22 Q. Is it your testimony that you are not sure who arranged for
23 the meeting to happen at Bryan Cave, is that correct?

24 A. I'm not sure.

25 Q. But it did happen at Bryan --

F812newH

Campriello - Direct

1 A. When I say I'm not sure, we could have discussed it in the
2 conversation with the assistants, but I don't remember that.

3 I'm sorry. I talked over your next question.

4 Q. The meeting did happen at Bryan Cave?

5 A. Yes.

6 Q. And it was agreed that Jay Dorman, who is someone Harvey
7 already knew, would call Harvey and tell him to come back to
8 the office, correct?

9 A. I thought it was Vincent Alfieri.

10 Q. But somebody he already knew would tell him to come back to
11 the office?

12 A. I thought it was Vincent Alfieri and I think he knew
13 Vincent Alfieri, so I guess the answer is yes.

14 Q. And when Harvey came back to the office --

15 A. When you say "came back to the office," I'm sorry. I don't
16 know where Mr. Newkirk was, so if he was somewhere else, I
17 didn't mean to adopt that as part of my answer.

18 Q. Between when you had your conversation with the agents and
19 the AUSAs, the first time you spoke to Harvey Newkirk was in
20 the conference room when he walked in, correct?

21 A. I don't think I even spoke to him then. I don't think I
22 said anything once he got in the room.

23 Q. You don't believe you spoke to him at all?

24 A. I don't believe I spoke to him at all.

25 Q. You don't think you introduced yourself?

F812newH

Campriello - Direct

1 A. I don't know if I was doing -- well, I don't know if I was
2 doing the introducing or if somebody else was. I don't
3 remember.

4 Q. You believe that he came in to the conference room perhaps
5 with Vinnie Alfieri, correct?

6 A. Yes.

7 Q. He is the managing partner of the New York office of Bryan
8 Cave?

9 A. Yes.

10 Q. He was already intimately familiar with the underlying
11 transaction, correct?

12 A. I don't know how familiar he was. I know he had some
13 familiarity.

14 Q. And you know he also had some familiarity with Harvey
15 Newkirk?

16 A. He is the managing partner. Yes.

17 Q. And it wasn't -- and yet Vinnie Alfieri was not the one who
18 sat in just to assert the privilege on behalf of Bryan Cave's
19 client, was he?

20 A. He is not a criminal lawyer, no.

21 Q. It is your testimony that only a criminal lawyer can assert
22 a privilege?

23 MS. PAUL: Objection.

24 THE COURT: No, I think that's a fair question. Give
25 the answer.

F812newH

Campriello - Direct

1 A. No. It is not my testimony that only a criminal lawyer can
2 do it, but it would be my testimony that if there are criminal
3 lawyers available, whenever one deals with a federal law
4 enforcement agent, on behalf of the law firm, it is probably
5 more prudent to have a criminal lawyer there.

6 Q. If the only issue is asserting privilege, then why does it
7 have to be a criminal lawyer?

8 THE COURT: Sustained, but let me just make sure I
9 understand.

10 The reason you wanted a criminal lawyer there was
11 because, although lawyers, both civil and criminal, are
12 familiar with the attorney/client privilege, this was, you
13 understood, a criminal investigation and therefore, given the
14 nature of the investigation, you wanted a criminal lawyer
15 there. Do I have that right?

16 THE WITNESS: Yes.

17 Q. Did you ascertain in your conversations with the agents and
18 the prosecutors why it was such a matter of urgency that
19 Mr. Newkirk be interviewed that afternoon?

20 A. I don't remember.

21 Q. Did you ask them what his status was?

22 A. I don't remember.

23 Q. Is that something you think is important?

24 A. Yes.

25 Q. Did you tell Mr. Newkirk that you had already spoken to the

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Campriello - Direct

1 agents and the AUSAs when he came in?

2 A. I didn't talk to Mr. Newkirk.

3 Q. Oh, you didn't give him *Upjohn* warnings?

4 A. I was not the one, no.

5 Q. Explain to me, when you went into that conference room, was
6 anyone already in there?

7 A. I don't remember.

8 Q. Who all was in that conference room before Harvey Newkirk
9 walked in?

10 A. I was there. Mary Beth Buchanan was there. I believe two
11 federal agents -- by "agents" I mean not prosecutors, two
12 federal agents I believe were there. There could have been a
13 prosecutor. I don't know. And I don't know if Mr. Dorman or
14 Mr. Alfieri was there, and I don't think anybody else was
15 there.

16 Q. If Ms. Buchanan was going to sit in on the interview with
17 Harvey and she was already there, why were you still there?

18 A. I think she came with me or she and I got there
19 simultaneously and, as I said, I was -- I wanted to make sure
20 that I reiterated to the federal people Bryan Cave's position,
21 and then I wanted to hear Ms. Buchanan give the *Upjohn*
22 warnings, what I am using loosely as the *Upjohn* warning, and
23 then I left.

24 Q. You wanted to reiterate that Bryan Cave is being 100
25 percent cooperative, correct?

F812newH

Campriello - Direct

1 A. Yes.

2 Q. That's why this meeting was set up, right?

3 A. No. There were -- I assume there were many reasons why the
4 meeting was set up. The government had reasons why the meeting
5 was set up. I didn't set up a meeting so that I could tell
6 them that we wanted to be 100 percent cooperative. I had
7 already told them that.

8 Q. Did they ask to speak to Mr. Newkirk or did they offer that
9 they should speak to Mr. Newkirk?

10 A. I don't think I offered that they should speak to
11 Mr. Newkirk.

12 Q. They asked to speak to Mr. Newkirk?

13 A. I don't remember them asking, but we had the meeting, and I
14 don't believe I offered.

15 Q. After that meeting, your understanding is that Bryan Cave
16 has been 100 percent cooperative in this case, correct?

17 A. I would hope so, that they have done what they are supposed
18 to do, but I haven't been involved.

19 Q. You never documented any discussions with Mr. Newkirk that
20 say that he is not a client of the firm?

21 A. No, no.

22 Q. And you never documented Ms. Buchanan stating at the
23 beginning of the meeting that she is not representing
24 Mr. Newkirk?

25 A. She did. I did not.

F812newH

Campriello - Cross

1 MS. CHAUDHRY: Thank you. I have no further
2 questions.

3 THE COURT: Anything from the government?

4 MS. PAUL: Just a couple of questions, your Honor.

5 THE COURT: Go ahead.

6 CROSS EXAMINATION

7 BY MS. PAUL:

8 Q. Mr. Campriello, just a couple of questions about the
9 February 12, 2014 meeting.

10 At that meeting, were you at any point in time
11 planning to represent Mr. Newkirk in his personal capacity?

12 A. No.

13 Q. And was anyone, as far as you were aware of, at Bryan Cave
14 planning to do that?

15 A. No.

16 Q. Did you in fact represent Mr. Newkirk at this interview?

17 A. No.

18 Q. Did Ms. Buchanan represent Mr. Newkirk at this interview?

19 A. No.

20 Q. Did she tell Mr. Newkirk in your presence that in fact she
21 was not representing him?

22 A. Yes.

23 Q. Why did you stay for that portion of the meeting?

24 A. To make sure I heard it happen.

25 Q. And why were you, as a criminal lawyer, involved in this

F812newH

Campriello - Cross

1 meeting at all?

2 A. Again, when federal law enforcement agents interact with
3 what I am thinking of as a client, namely, Bryan Cave in this
4 instance, I think that it is, as the judge's question posed it,
5 prudent to have a criminal lawyer there.

6 Q. At any point before the interview began that day, did
7 you --

8 THE COURT: At least to prevent your civil partners
9 from having heart attacks.

10 THE WITNESS: It is not just that, but they bring a
11 very different attitude to bear.

12 Q. Mr. Campriello, at any point before the meeting began that
13 day, did you consult privately with Mr. Newkirk?

14 A. No.

15 Q. Did you consult privately with Mr. Newkirk at any point in
16 time at all?

17 A. No.

18 Q. And at any point in time did Mr. Newkirk ask you for legal
19 advice?

20 A. No.

21 MS. PAUL: One moment, your Honor.

22 (Counsel confer)

23 MS. PAUL: No further questions.

24 THE COURT: Anything else.

25 MS. CHAUDHRY: No, thank you, your Honor.

F812newH

Campriello - Cross

1 THE COURT: Thank you so much. You may step down.

2 THE WITNESS: Thank you, Judge.

3 (Witness excused)

4 THE COURT: Does the government have any other
5 witnesses they want to call?

6 MR. ADAMS: Yes, your Honor.

7 THE COURT: Go ahead.

8 MR. ADAMS: We will call Special Agent Paul Deal next.

9 THE COURT: While we are waiting, do I understand that
10 the government in the documents it has turned over previously
11 has held back some portions of those documents as 3500
12 material?

13 MR. ADAMS: No, your Honor. I think that the dispute
14 in the motion refers to certain portions that we turned over
15 after our last conference, and we were -- the government was
16 asked to turn over statements by Bryan Cave personnel regarding
17 the interviews that they had conducted of Mr. Newkirk. So
18 statements by Bryan Cave personnel that are not related to
19 their interviews but were related more generally to the Maxim
20 deal were redacted, and those will be 3500 and produced in the
21 normal course.

22 THE COURT: They will be 3500 because you are going to
23 be calling them as a witness in the underlying charges.

24 MR. ADAMS: Yes, your Honor.

25 THE COURT: So what's the harm in turning them over

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Campriello - Cross

1 now?

2 MR. ADAMS: Your Honor, the general -- no specific
3 harm other than, with respect to this hearing, the relevant
4 issue was what was said --5 THE COURT: I understand why you did it, but now I am
6 just exploring. You know you are going to have to turn it over
7 eventually.

8 MR. ADAMS: Yes, sir.

9 THE COURT: Of course I can't compel you under the
10 Jencks Act to turn them over until the conclusion of the direct
11 testimony of the witness to whom they apply, but it has, to the
12 great credit of the U.S. Attorney's office of the Southern
13 District of New York, never been its practice to wait that far.
14 Why are you waiting now?15 MR. ADAMS: Your Honor, at the last conference we
16 discussed an early production of 3500, and I forget the precise
17 date, it was significantly earlier than our normal practice,
18 and I would ask to stick with that.19 THE COURT: But why? In other words, what I am trying
20 to get at is, I am not saying that the other side will be
21 prejudiced since you have graciously agreed to turn over 3500
22 in advance of trial on the date agreed to, which I think was
23 either one or two weeks before trial, at least that's my usual
24 request, but, golly, gee, what's the harm?

25 MR. ADAMS: Your Honor, protecting trial strategy

F812newH

Campriello - Cross

1 generally based on the questions I have been asking witnesses.

2 THE COURT: Protecting trial strategy. Oh, my gosh.
3 In other words, you want to surprise them.

4 MR. ADAMS: Not badly, your Honor, which is why we are
5 offering the 3500.

6 THE COURT: To surprise them a little, a little. So
7 it's not a sandbag, it's sort of like a soft sandbag.

8 MR. ADAMS: Your Honor, we are talking about mostly
9 witnesses with whom Mr. Newkirk worked intimately. None of the
10 things that they will be testifying about should be things that
11 Mr. Newkirk isn't already aware of.

12 THE COURT: Well, I think that you should reconsider
13 and maybe turn -- it seems to me, frankly, a waste of time to
14 turn over half a document and not the other half, so to speak.
15 I can't force you to do that if it is purely 3500 material. Of
16 course if there is even a smidgen of *Brady* anywhere in that
17 material and you haven't figured that out, woe be to you. But
18 I think you might want to reconsider that.

19 MR. ADAMS: Thank you, your Honor.

20 THE COURT: Let's call the next witness. The agent
21 should come on up.

22 PAUL BAYLOR DEAL,

23 called as a witness by the government,

24 having been duly sworn, testified as follows:

25 THE COURT: Counsel.

F812newH

Deal - Direct

1 MR. ADAMS: Thank you, your Honor.

2 DIRECT EXAMINATION

3 BY MR. ADAMS:

4 Q. Agent Deal, where do you work?

5 A. I am a special agent with the United States Secret Service
6 here in New York.

7 Q. How long have you been with the Secret Service?

8 A. Almost five years now.

9 Q. In the course of your duties have you been involved in the
10 investigation of Harvey Newkirk in connection with an attempted
11 acquisition of Maxim Magazine?

12 A. Yes.

13 Q. Directing your attention to February 12, 2014, what were
14 you assigned to do on that day?

15 A. Beginning that morning, we attempted to execute an arrest
16 warrant for Calvin Darden, Jr., at his residence in Staten
17 Island. We conducted a consent search of the residence. Later
18 that afternoon, he surrendered himself and finally that evening
19 I interviewed Mr. Harvey Newkirk.

20 Q. Where did that interview take place?

21 A. At the offices of Bryan Cave here in Manhattan.

22 Q. When you arrived at Bryan Cave for that interview, who did
23 you initially meet with?

24 A. Mary Beth Buchanan.

25 Q. What did you and Ms. Buchanan discuss generally?

F812newH

Deal - Direct

1 A. In general we discussed how the interview of Mr. Newkirk
2 was going to happen at the law firm. She expressed some
3 concerns that during the interview he may disclose some
4 attorney/client privileged information that the firm would be
5 obviously concerned about and although it is not our normal
6 practice, I understood that concern and I agreed to let her sit
7 in on the interview and object as necessary to protect any
8 attorney/client privilege information.

9 Q. Did that interview ultimately take place?

10 A. It did.

11 Q. At the outset, what did you hear Ms. Buchanan say to
12 Mr. Newkirk, if anything?

13 A. She turned to him and explained to him that she was not
14 there to represent him, that she was there solely to protect
15 the disclosure of any attorney/client privilege information in
16 the interest of the clients of the firm.

17 THE COURT: Who else, if anyone, was present when that
18 statement was made?

19 THE WITNESS: Your Honor, in the room when that
20 statement was made there was Austin Campriello, Vince Alfieri,
21 and Ms. Mary Beth Buchanan, and then myself and S.A. James
22 Hilliard from the F.B.I.

23 THE COURT: Go ahead.

24 MR. ADAMS: Thank you, your Honor.

25 Q. After receiving that information from Ms. Buchanan did you

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Deal - Direct

1 begin your interview?

2 A. I did.

3 Q. You took notes during your interview?

4 A. I did.

5 Q. Did you record in any way Ms. Buchanan's instructions
6 regarding her role during the interview?

7 A. No, I did not. I didn't start taking notes until I began
8 questioning and Mr. Newkirk began providing answers to the
9 questions.

10 Q. As you sit here today, do you have a present recollection
11 of her providing that instruction?

12 A. Yes.

13 Q. What legal advice, if any, do you recall Mr. Newkirk
14 requesting from Ms. Buchanan during the course of the
15 interview?

16 A. He received no legal advice during the interview.

17 Q. To the best of your recollection --

18 THE COURT: Did he at any occasion ask to step outside
19 with her.

20 THE WITNESS: He did not, your Honor.

21 THE COURT: Did she ask to have him step outside?

22 THE WITNESS: Not to my recollection, your Honor.

23 THE COURT: So they remained in the room to your
24 recollection throughout the interview.

25 THE WITNESS: Yes, your Honor.

F812newH

Deal - Direct

1 THE COURT: How long was the interview?

2 THE WITNESS: Approximately an hour to 90 minutes,
3 your Honor.

4 THE COURT: Go ahead.

5 MR. ADAMS: Thank you, sir.

6 BY MR. ADAMS:

7 Q. To the best of your recollection, what, if anything, did
8 you inform Mr. Newkirk of regarding his status with respect to
9 your investigation?

10 A. I didn't inform him anything about his status in the
11 investigation.

12 Q. While you were with Mr. Newkirk at Bryan Cave, did you ask
13 if he would be willing to meet with you again?

14 A. I did, and I gave him my business card.

15 Q. Did you in fact meet with Mr. Newkirk again?

16 A. I did.

17 Q. Directing your attention to February 14, 2014, did you
18 participate in a second interview of Mr. Newkirk on that day?

19 A. Yes.

20 Q. Where was that?

21 A. At the U.S. Attorney's office for the Southern District of
22 New York.

23 Q. Who participated in that interview?

24 A. Mr. Newkirk, assistant United States Attorney James
25 Pastore, and myself.

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Deal - Direct

1 THE COURT: Are you single or married?

2 THE WITNESS: I am married, your Honor.

3 THE COURT: So that's why you were spending
4 Valentine's Day at the office.

5 THE WITNESS: It's actually worse than that. My child
6 was born a week later, too.

7 THE COURT: Go ahead.

8 MR. ADAMS: Thank you, sir.

9 BY MR. ADAMS:

10 Q. Agent Deal, what warnings, if any, were provided to
11 Mr. Newkirk at that second interview?

12 A. AUSA Pastore gave him what I would call the 18 U.S.C. 1001
13 warning, basically the fact that if he made a material
14 misstatement to law enforcement, he could be charged for that.

15 Q. Was Mr. Newkirk present with counsel on that day?

16 A. No. It was just Mr. Newkirk.

17 Q. What, if anything, did Mr. Newkirk say regarding whether or
18 not he had counsel with respect to your investigation?

19 A. He said nothing about having counsel.

20 MR. ADAMS: Your Honor, may I approach?

21 THE COURT: Yes.

22 BY MR. ADAMS:

23 Q. Agent Deal, I am showing you what I have marked as
24 Government Exhibit 9. Do you recognize that document?

25 A. I do.

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Deal - Direct

1 Q. What is it?

2 A. This is an e-mail from Harvey Newkirk to myself at my
3 Secret Service e-mail account.

4 Q. Have you most recently seen that exhibit before I just
5 handed it to you?

6 A. I pulled this from our Secret Service archive this morning.

7 Q. Was that e-mail kept in the normal course of the Secret
8 Service archive?

9 A. Yes. It is required by regulation.

10 Q. Looking at the top line of the exhibit who does it appear
11 that the first or top e-mail is from?

12 A. The first e-mail is from Harvey Newkirk at
13 hnewkirk06@gmail.com.

14 MR. ADAMS: Your Honor, the government offers Exhibit
15 9.

16 THE COURT: Received.

17 (Government's Exhibit 9 received in evidence)

18 MR. ADAMS: Your Honor I would ask Agent Deal to read
19 the first e-mail, the one at the top unless --

20 THE COURT: No, I have just read it.

21 MR. ADAMS: Okay. Thank you, sir.

22 BY MR. ADAMS:

23 Q. Agent Deal, was the February 14 interview of Mr. Newkirk
24 the last time that you spoke with him in the course of your
25 investigation?

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Deal - Direct

1 A. No.

2 Q. Directing you to January 22 of this year, did you interview
3 Mr. Newkirk on that day?

4 A. I did.

5 Q. Where did that take place?

6 A. At the office of Stealth SME here in Manhattan.

7 Q. Who was present at that?

8 A. Mr. Newkirk, S.A. Hilliard from the F.B.I., and myself.

9 Q. What did Mr. Newkirk's role at Stealth appear to be?

10 A. This is --

11 MS. CHAUDHRY: Objection: relevance.

12 THE COURT: I'm sorry. I didn't hear the question.

13 Q. What did Mr. Newkirk's role at Stealth appear to be?

14 THE COURT: Sustained.

15 BY MR. ADAMS:

16 Q. Prior to speaking with Mr. Newkirk at Stealth on that day,
17 who, if anyone, did he call to come represent him during that
18 interview?

19 A. He called no one to represent him.

20 Q. And did anyone at any point arrive to provide him with
21 legal representation during that interview?

22 A. No.

23 Q. What, if anything, did he tell you regarding his status as
24 a represented person during that interview?

25 A. Nothing.

F812newH

Deal - Cross

1 Q. And directing you now to March 17, 2015, did you interview
2 Mr. Newkirk again on that day?

3 A. I did.

4 Q. Where did that take place?

5 A. Again, at the office of Stealth SME.

6 Q. And who was present for that interview?

7 A. Mr. Newkirk, S.A. Hilliard, and myself.

8 Q. Who represented Mr. Newkirk during the second interview?

9 A. Mr. Newkirk was alone at that interview.

10 Q. When during that interview, if at all, did Mr. Newkirk tell
11 you that he had personal representation?

12 A. Never.

13 MR. ADAMS: Just one moment, your Honor.

14 THE COURT: Yes.

15 (Pause)

16 MR. ADAMS: No further questions.

17 THE COURT: Cross-examination.

18 CROSS EXAMINATION

19 BY MS. CHAUDHRY:

20 Q. Good evening, Agent Deal. I am Priya Chaudhry. I
21 represent Harvey Newkirk.

22 A. Good evening.

23 Q. You were an attorney before you became a Secret Service
24 agent?

25 A. Yes, ma'am. I am still licensed in the State of South

F812newH

Deal - Cross

1 Carolina.

2 Q. For how long have you been an attorney?

3 A. I was admitted to the bar in 2009.

4 Q. And did you practice?

5 A. I did.

6 Q. In what field?

7 A. I was primarily family law and employment discrimination.

8 Q. Before you went to Bryan Cave on February 12, 2014, you had
9 already arrested Calvin Darden, Jr., correct?

10 A. Yes, ma'am. He surrendered himself that afternoon.

11 Q. You had already spoken to Calvin Darden, Sr., hadn't you?

12 A. Yes Calvin Darden, Sr., actually called me as I was
13 crossing the Verrazano Bridge on my way back from Staten
14 Island.

15 Q. How did he have your number, do you know?

16 A. Yes. My understanding is he got the number from
17 Mr. Darden's wife.

18 Q. Before you went to Bryan Cave on the 12th, you called Bryan
19 Cave, correct?

20 A. No, actually Bryan Cave called me.

21 Q. Bryan Cave called you?

22 A. Yes, ma'am.

23 Q. Who called you?

24 A. I believe it was Vince Alfieri called me.

25 Q. What was the substance of your conversation?

F812newH

Deal - Cross

1 A. From what I could recall, it was essentially they found out
2 about the arrest of Calvin Darden, Jr. I had been asking to
3 speak with Harvey Newkirk, and they were willing to arrange
4 that meeting to allow me to speak with Harvey Newkirk.

5 Q. How did they know that -- did you tell them that you wanted
6 to speak to Harvey Newkirk?

7 A. I did not.

8 Q. It's your statement that they called you and said, We know
9 you want to talk to Harvey Newkirk?

10 A. They said something to the effect that they wanted to
11 cooperate and that -- I can't remember the full context of the
12 conversation. That's the gist of the conversation.

13 Q. Do you remember whom you spoke with?

14 A. Again, I believe it was Vince Alfieri.

15 Q. And your recollection is he contacted you to tell you Bryan
16 Cave wanted to cooperate and that you could speak to Harvey
17 Newkirk?

18 A. And that Harvey Newkirk was at the office at that time.

19 Q. He volunteered that information to you?

20 A. Yes, ma'am.

21 Q. Did you talk about whether Harvey Newkirk was a subject
22 witness or target of this investigation?

23 A. I did not.

24 Q. What was he at the time?

25 A. In my mind he was a subject.

F812newH

Deal - Cross

1 Q. Whose idea was it to interview Harvey Newkirk that day?

2 A. That day? After that conversation, I called AUSA Pastore,
3 informed him of the offer to allow the interview, and
4 Mr. Pastore instructed me to head over to Bryan Cave.

5 Q. Did you have an appointment set up before you headed over
6 to Bryan Cave?

7 A. After speaking to AUSA Pastore, I called back and confirmed
8 that I was en route to Bryan Cave.

9 Q. Whom did you have this confirmation call with?

10 A. Again my recollection is that it was Mr. Alfieri.

11 Q. Did you speak to Harvey Newkirk on the phone before you got
12 to Bryan Cave?

13 A. I did not.

14 Q. Did you suggest to Mr. Alfieri that Harvey Newkirk should
15 get a lawyer?

16 A. I did not.

17 Q. Do you recall how long it was between your first call?

18 THE COURT: Actually let me interrupt for a moment,
19 counsel. I am going to ask the witness to step out for just
20 one minute and then we will call you right back.

21 (Witness exits courtroom)

22 THE COURT: So at this point, we have already had
23 three witnesses who say that your client was advised at the
24 outset of this meeting by Ms. Buchanan that she was not
25 representing him. He has a different recollection. But

F812newH

Deal - Cross

1 assuming I credited that testimony, is there anything left to
2 your motion?

3 MS. CHAUDHRY: Assuming you credit the testimony of
4 the three witnesses?

5 THE COURT: Yes.

6 MS. CHAUDHRY: I believe there is, your Honor, because
7 there are two different litigations going on here. One is the
8 one that was preexisting before this agent was offered up
9 Harvey Newkirk by Bryan Cave and the second is the criminal
10 investigation.

11 Bryan Cave had already established with Mr. Newkirk,
12 by their behavior and his reasonable understanding of that
13 behavior, that they are representing him in this litigation.
14 We have heard over and over that this is a firm that
15 self-represents. They have their criminal partner call the
16 AUSA. They have their general counsel and their own litigators
17 deal with a lawsuit that is swirling around them, and this
18 relationship was preexisting. Whether or not Mr. Newkirk
19 decided or believed that, after the 12th, they were still
20 representing him on the criminal side, he still had a
21 reasonable and real belief that he was in a joint defense
22 situation with Bryan Cave in that they were representing him in
23 the litigation against them which there is only liability for
24 them if he is liable. And they kept calling him in and kept
25 meeting with him and kept speaking with him and then turning

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Deal - Cross

1 that information over to both the government and the alleged
2 victim in this case.

3 THE COURT: Before February 12, what litigation are
4 you referring to?

5 MS. CHAUDHRY: Before February 12, your Honor, the
6 Maxim deal, to sketch it out, was contingent on loans from
7 other parties, and the terms of some of those loans didn't come
8 through; therefore, some of those parties threatened to sue
9 Bryan Cave, the clients that Mr. Newkirk was representing
10 Calvin Darden, Sr. and Darden Media, and had threatened to sue
11 Harvey Newkirk personally.

12 THE COURT: When did those threats occur?

13 MS. CHAUDHRY: Those threats occurred I believe
14 starting in November.

15 THE COURT: And were they oral or in writing.

16 MS. CHAUDHRY: I believe that they were -- I believe
17 they were oral, but they came true and became in writing, and
18 those litigations are still happening. Those were a lot of the
19 reasons that --

20 THE COURT: My question is, it was before February 12
21 they are oral?

22 MS. CHAUDHRY: They were oral. The lawyers for the
23 lenders who felt that the loan had been defaulted on or the
24 contract had been breached had clearly contacted Bryan Cave and
25 threatened that they are going to sue. This is why this deal,

F812newH

Deal - Cross

1 which was in the mergers and acquisition department, suddenly
2 involved all these litigation partners and involved the general
3 counsel's office.

4 THE COURT: But as of February 12, he now knows --
5 assuming I credited the three witnesses we just heard -- that
6 they are not representing him, and he learns at the end of the
7 conversation that he is a subject, so with respect to any
8 statements he makes after that, just take that for a moment, he
9 is already on notice that he doesn't have an attorney/client
10 privilege *vis-à-vis*, at the minimum, the criminal
11 investigation.

12 Now, are the statements -- let me ask the government
13 first -- that were received from Bryan Cave that are attributed
14 to Mr. Newkirk that relate to statements made by him to Bryan
15 Cave attorneys prior to February 12?

16 MR. ADAMS: There are -- there would be evidence of
17 statements made to many Bryan Cave attorneys prior to February
18 12.

19 THE COURT: But in the context of an inquiry by Bryan
20 Cave attorneys as to how to respond to threats of litigation.

21 MR. ADAMS: In the following sense, sir. The
22 defaulted loan that Ms. Chaudhry has been referring to, this is
23 the OpenGate matter that has come up a few times today, it is
24 true Mr. Newkirk accepted service for Calvin Darden, Sr., at a
25 point after that default occurred. There would be -- and the

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Deal - Cross

1 entities also party to the loan agreement were served with the
2 same default. The service processor had that forwarded to
3 Mr. Newkirk as well. So Mr. Newkirk had possession of the
4 information about that default. Partners at Bryan Cave we
5 expect would be testifying that they did not know about that
6 default until sometime thereafter or that litigation had
7 actually significantly progressed to fruition of the default
8 judgment against Mr. Calvin Darden, Sr., until significantly
9 later. There would certainly be some testimony about that
10 civil litigation in the context of Mr. Newkirk --

11 THE COURT: Let me go back to defense counsel. What
12 evidence is there from your side that any of those
13 conversations -- this is pre-February 12 -- involved
14 Mr. Newkirk asking for legal advice from the lawyers at Bryan
15 Cave?

16 MS. CHAUDHRY: Your Honor, Mr. Newkirk is not a
17 litigator, and it had become a litigation. He was asked to
18 respond to discovery requests I believe the government has
19 turned over in its materials here, actual interrogatories from
20 another party that Bryan Cave had Mr. Newkirk sit down, come
21 in, and tell them the answers to those things.

22 MR. ADAMS: Your Honor --

23 THE COURT: Here what -- please sit down.

24 Finish what you were going to say, and then I have a
25 question.

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Deal - Cross

1 MS. CHAUDHRY: During all of these conversations it
2 was understood that Bryan Cave and Harvey Newkirk could be
3 named and if Bryan Cave --

4 THE COURT: Even assuming *arguendo* the existence of an
5 attorney/client relationship prior to February 12 -- because I
6 see none after February 12, to be frank -- if the
7 attorney/client privilege only protects statements made by the
8 client for the purpose of obtaining legal advice, first of all,
9 I expect that Mr. Newkirk learned that in law school. But
10 let's assume he didn't. It doesn't matter. It is not a
11 subjective test at all. It is a totally objective test. If I
12 go to my lawyer and I say, by the way, while we are here, I
13 would like your business advice on X, Y, or Z, that's not
14 protected. And the fact that you may think it is protected
15 because he is your lawyer is your tough luck. It has to be a
16 communication made for the purpose of obtaining legal advice.
17 So based on the current record, I don't see a basis for
18 asserting privilege even as to the pre-February 12
19 communications.

20 MS. CHAUDHRY: Our position is that Mr. Newkirk was
21 seeking the counsel of the litigation department so that he
22 would not be personally named and that Bryan Cave would also
23 not be named here, as one does with their counsel, agreeing to
24 answer any and all questions and provide any and all
25 information, assuming that those questions are being asked to

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Deal - Cross

1 protect him and his interests.

2 THE COURT: That is a fair argument, but I haven't
3 heard yet any real evidence of that.

4 Anyway, here is why I interrupt at this point, and
5 then we will continue. I don't see any point in questioning
6 the agent any further. I don't see any point, if you have the
7 other agent here, unless the defense wants to bring the agent
8 in for some reason that I can't understand, because I am
9 prepared to make now a finding, which I make, in the court's
10 view, by clear, convincing, wholly credible and total evidence
11 that he received full notice at the outset on February 12 that
12 the firm was not representing him and, moreover, he knew
13 certainly by the end of that meeting that he had some at least
14 potential liability. So the motion with respect to any and all
15 statements made from February 12 on is denied.

16 So I guess my question for counsel, and you may want
17 to individually think about this -- we will take another short
18 break -- is whether there is anything else of an evidentiary
19 nature you want to present tonight bearing on the pre-February
20 12. Otherwise, I will just hear oral argument on that.

21 We also have the subpoena, and I want to do that
22 tonight as well. And just to warn the government up front, I
23 don't see any basis for -- and maybe Mr. Silverman on that
24 needs to be heard as well, as subpoena to Bryan Cave. I don't
25 see any basis for quashing it in its entirety. We may have to

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Deal - Cross

1 limit its scope.

2 All right. We will take a five-minute break.

3 (Recess)

4 THE COURT: Okay. My first question to both sides is,
5 does anyone want to call any other witness, given the ruling I
6 just made.

7 MR. ADAMS: No, your Honor.

8 MS. CHAUDHRY: No, your Honor.

9 THE COURT: Now let's turn to oral argument on the
10 pre-February 12 statements. Since the defense bears the
11 burden, I will hear from the defense first.

12 MS. CHAUDHRY: Your Honor, whereas I don't want to
13 call any further witnesses given the court's ruling, I just
14 want to put on the record that -- I believe the court has
15 looked at the government exhibits -- neither this agent nor the
16 other agent's notes reflect anything about Mr. Newkirk being
17 unrepresented.

18 THE COURT: I assume that to be the case. I will take
19 that into consideration. I assumed it already from what I
20 heard earlier. And I assume that if defense counsel had wanted
21 to make the arguments, they could have argued that all three or
22 putatively all four people were lying because there was nothing
23 in the notes, because there were a variety of minor
24 inconsistencies between their various accounts, and because
25 they all had biases and motives to lie and so forth, all of

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Deal - Cross

1 which I thought about as I was listening to them. But the
2 court found them to be highly credible; and, on the key fact
3 that Mr. Newkirk was advised that they were not representing
4 him, there was no material inconsistency and they all have an
5 independent recollection of it. Moreover, as to his being
6 advised he was a subject, which occurred at the end, even he
7 has that recollection. So it seems to me, without going
8 through all the various nuances of this, that it is a fact
9 proven to the court's satisfaction -- to be frank, beyond a
10 reasonable doubt, not that that's the required standard at
11 all -- that he was advised at the outset that he was not being
12 represented by the firm and by their lawyers. Moreover, he
13 learned at the end of the session that he was a subject and
14 that that was a serious matter, was confirmed by the very fact
15 that he was then put on leave knowing that there was a criminal
16 investigation, knowing that there had been already an arrest
17 made, knowing that the firm had advised him that they were not
18 representing him, knowing that a subject, even in the somewhat
19 tepid description given by Ms. Buchanan as more than just a
20 witness and he was so free of any desire to be represented by
21 any counsel that he calls up or e-mails the U.S. Attorney's
22 office within a day or so after the meeting on the 12th and
23 waltzes down to meet with them all by himself to continue the
24 providing to them of information out of his own mouth, knowing
25 by the way, as he admitted, of course, that he had a Fifth

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1 Amendment right independent of representation of counsel, and
2 that was a strategic decision on his part, whether prudent or
3 imprudent, time will tell, but totally inconsistent in the
4 court's view with any notion that he is being represented by
5 Bryan Cave. If he was being represented in his mind by Bryan
6 Cave, not that it's a subjective test in any event, he would
7 have discussed with them, Should I go down? Should I provide
8 them with further information? I am a subject. Do I have any
9 problems?

10 This is not like the classic *Upjohn* situation,
11 although even if it were, I would reach the same conclusion.
12 This is a lawyer; not one familiar with the criminal process,
13 but a man of education, a man of intelligence, and a man with
14 some understanding of the legal process. Every step he took
15 is, in the court's view, inconsistent with the notion that he
16 believed he was represented by counsel, let alone the ultimate
17 question of whether in fact he was.

18 MS. CHAUDHRY: Your Honor, if I may, your points are
19 all well taken and actually support the notion that his
20 behavior in the exact opposite way in the civil litigation
21 context shows that he was not freely acting as his own agent
22 there because, unlike in the criminal matter, where you say he
23 on his own contacted the government and he went and met with
24 them, in the civil matter, he did no such thing. He still went
25 through Bryan Cave.

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Deal - Cross

1 THE COURT: And that's fair. I just wanted to place
2 on the record why I thought there was no need to have further
3 argument on the post-February 12 stuff, but let's talk about
4 the pre-February 12.

5 MS. CHAUDHRY: I'm sorry. I just want to be clear.
6 When you say post-February 12 statements, are you talking about
7 his statements to the government or any statement he made after
8 February 12.

9 THE COURT: Well, I think any statement, but I am
10 willing to hear you on that as well. But let's start with --
11 before we even get to that question, so any time a firm is
12 threatened with litigation in connection with a civil matter,
13 of course they are going to meet. Sometimes they will bring an
14 outside counsel, many times they will represent themselves; and
15 particularly before there is any lawsuit, they almost certainly
16 will represent themselves. They will talk to all the partners,
17 associates, lawyers, who were involved in the matter to find
18 out what the facts were and how they should proceed.

19 So if that were the whole story, there would be no
20 reason for any reasonable lawyer in that situation to think
21 that somehow he or she was being individually represented, even
22 if they happened to be the partner on the case or whatever.

23 The only thing that gives me pause that I want to hear
24 from the government in a minute is your assertion, which I
25 can't remember whether they testified to this or not, but your

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Deal - Cross

1 assertion that from early on the threat was to sue him
2 personally as well as the firm and what is the evidence of
3 that.

4 MS. CHAUDHRY: Your Honor, I also can't recall if he
5 testified about it, but I think he also said asked him during
6 the court's questioning, yes, the issue was we were discussing
7 whether Bryan Cave and I were --

8 THE COURT: All right, so I will assume that. Is
9 there any independent evidence of that.

10 MS. CHAUDHRY: Well, your Honor, here is where we
11 reach an interesting Catch-22. The government has not turned,
12 I believe, looking at the subpoena that they just gave us that
13 they served on Bryan Cave, that they probably have all
14 communications with Bryan Cave and Harvey Newkirk about
15 anything and they have not turned over to us anything they
16 don't consider Rule 16. We have gotten like a rolling rule 16
17 production including even this morning. We don't have access
18 to those. In the government's papers in response to our motion
19 they say, We didn't subpoena Bryan Cave; and then when we tried
20 to subpoena Bryan Cave, they objected and said --

21 THE COURT: We are going to deal with that in a
22 moment. So you are saying if there is a record of this, they
23 would have it and you would like to get it, but you don't have
24 it now.

25 MS. CHAUDHRY: Succinctly said.

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Deal - Cross

1 THE COURT: So let me go to the government and we will
2 come right back to you in a minute.

3 So, if you know -- I don't know how voluminous these
4 materials were, but are there records of communications made to
5 Bryan Cave prior to February 12? We also have to consider
6 after February 12 in a minute, but I just want to stick with
7 prior to February 12 in which someone says we are going to sue
8 you and we are going to sue Mr. Newkirk or we are seriously
9 considering that.

10 MR. ADAMS: Two points, your Honor. First, every
11 single e-mail record that I have received from Bryan Cave I
12 have handed over to Mr. Newkirk and his attorneys.

13 THE COURT: Okay.

14 MR. ADAMS: Second, I am aware of no such e-mail that
15 says that Mr. Newkirk personally was being threatened with suit
16 at all. In fact, to be very clear about this, the suit that
17 has been brought up over and over again is the OpenGate
18 lawsuit. It was in New York State Supreme Court, it was
19 actually filed, did not include Mr. Newkirk, it did not include
20 Bryan Cave. My understanding is that Bryan Cave has not been
21 sued at all in connection with the Maxim deal, at least that's
22 my understanding right now. And I popped up just briefly a
23 moment ago.

24 THE COURT: I thought you were just getting exercise.

25 MR. ADAMS: A bit of both, but I was going to make one

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Deal - Cross

1 quick clarification which I will make now, which is,
2 Ms. Chaudhry was describing Mr. Newkirk speaking to Bryan Cave
3 about some interrogatories that were served, and it sounded to
4 me like that was being proffered in the context of sort of
5 pre-February 12 litigation. If we are talking about the same
6 thing, that is well after February 12. That is part of the
7 conversation with a third-year associate regarding a
8 third-party subpoena served on Bryan Cave.

9 THE COURT: Let me ask a different question.

10 Assuming, which at the moment it seems doubtful, but let's
11 assume for hypothetical that the firm says to Mr. Newkirk prior
12 to February 12 there are at least sounds about suing you and
13 suing us in connection with this deal, and from what you told
14 us there is absolutely no conflict, so we are going to
15 represent you and us. None of these conversations apparently
16 took place, but I am just putting this as a hypothetical. And
17 then on February 12, they learn that it is now a criminal
18 investigation. But the civil stuff is still ongoing in my
19 hypothetical. They are still being threatened with lawsuits
20 and maybe lawsuits follow. So they say to him, you know, given
21 that you are a subject, we are putting you on leave, but you
22 still have to cooperate with us, and they bring him in to ask
23 him questions that are related to their potential civil
24 liability.

25 If, in my totally made-up hypothetical they had

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Deal - Cross

1 previously said to him, We are going to represent you as well
2 as the firm in the civil context, and after February 12 they
3 say, Well, we want you to come in and cooperate with us, as we
4 told you you had to do, because we are still preparing to head
5 off this potential civil litigation, would not it be reasonable
6 to infer that they were still representing him on the civil
7 litigation even if they weren't -- even if they had disclaimed
8 any criminal representation?

9 MR. ADAMS: No, your Honor, I don't think it possibly
10 could be.

11 THE COURT: Why?

12 MR. ADAMS: Given the complete overlap of the two
13 subject matters. If there is a conflict on the criminal side
14 that has been made explicit, then there is a conflict on the
15 civil side of exactly the same fact pattern that has been made
16 explicit.

17 THE COURT: So that -- let me go back to defense
18 counsel -- you still have your argument for before February 12.
19 I will get back to that in a minute. But why isn't the
20 government's response the right response with respect to
21 February 12? He can't make this artificial distinction. At
22 this point he knows that the firm is not representing him in
23 connection with the inquiries by the government and that's the
24 same subject matter that he is being asked about in connection
25 with the hypothetical preparation for civil litigation.

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Deal - Cross

1 MS. CHAUDHRY: Well, your Honor, I believe the answer
2 to your question is actually reality. First, your hypothetical
3 is reality and, second is, law firms routinely represent a
4 client in one matter and not another. In fact, engagement
5 letters have to state explicitly what you do represent the
6 person in and what you don't, and we do that for a couple of
7 reasons. One is to curb our own liability, that we are only
8 responsible for this part of your life and other parts we are
9 not responsible for, and also we are required by ethics rules
10 to make that clear all the time.

11 THE COURT: But, excuse me for interrupting, I
12 understand that general thing, but this is a little different.
13 Here they have told him two things at a minimum: one, we are
14 not representing you in connection with the government's
15 inquiry; and, number two, we are going to cooperate completely
16 with the government's inquiry.

17 MS. CHAUDHRY: They have not told him that.

18 THE COURT: Oh, I think -- I can't remember if anyone
19 said that explicitly during the meeting, but it was
20 self-evident, was it not, the whole point of the meeting was to
21 cooperate.

22 MS. CHAUDHRY: Mr. Newkirk's testimony is that he did
23 not know Bryan Cave was doing this, and I don't believe there
24 is any testimony that the conversations between Bryan Cave and
25 the government saying we are cooperating ever happened in his

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Deal - Cross

1 presence.

2 THE COURT: I am willing to assume that, but isn't it
3 self-evident in the nature of the meeting?4 MS. CHAUDHRY: It would be self-evident to you,
5 myself, and the government because we are criminal
6 practitioners or at least you were at one point. It would not
7 be self-evident to a mergers and acquisitions lawyers who that
8 is all he has done in his entire career and who had a class in
9 criminal law first year of law school. That would not be
10 clear. He is cooperating with Bryan Cave. That is why he came
11 back to the office that day. That's why he sat down and they
12 set up this meeting for him and they sent him an e-mail very
13 explicitly stating what he is and is not expected to do, what
14 he can and cannot do, and nowhere in there do they say anything
15 about we have no privilege with you. Instead they say we
16 expect you to keep cooperating with us and then they behave
17 exactly the same pre-February 12 as they do post February 12.
18 They still call him. In fact, the e-mails that are just
19 related to this hearing show that they set up a meeting with
20 him for an hour later and he comes in on February 26, and they
21 set this up in anticipation of speaking to Darden, Sr.'s
22 lawyers and meeting with Darden, Sr., but they don't tell him
23 that. They are still treating him the same way, as Mr. Adams
24 points out, they have even a third-year litigation associate
25 sitting down with him, asking him questions, getting

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Deal - Cross

1 information, gearing up to answer these questions.

2 THE COURT: Let me hear anything further either side
3 wants to say, starting with the government.

4 MR. ADAMS: Thank you, sir.

5 Two points. First, you don't have to assume that it
6 was made clear that Bryan Cave wished to cooperate with the
7 government. I think Mr. Campriello actually testified that
8 when he walked into the room that was one of the two purposes
9 for which he was there.

10 THE COURT: Clearly he said it was the purpose, but
11 Ms. Chaudhry's point is that while Mr. Campriello said that to
12 the agents in the telephone conversations he had, and while
13 that was his desire and purpose and presumably Ms. Buchanan's
14 as well, that her point is it wasn't actually said in
15 Mr. Newkirk's presence, right?

16 MS. CHAUDHRY: Yes. And Mr. Campriello testified that
17 once Harvey Newkirk walked in the room, he doesn't even think
18 he spoke.

19 MR. ADAMS: Your Honor, that's correct. I think he
20 testified that he stayed long enough to make sure that it was
21 made clear that Bryan Cave wanted to cooperate.

22 THE COURT: All right. Are the agents still around?

23 MR. ADAMS: I believe they are.

24 THE COURT: We could call them back to ask them that
25 question, but let's hear what else you wanted to say.

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Deal - Cross

1 MR. ADAMS: Certainly.

2 Second, I don't disagree that their treatment of
3 Mr. Newkirk pre- and post February 12, other than the fact that
4 he was placed on leave and specifically told that he was the
5 subject of an investigation, changed all that much. He was
6 treated like an employee of the law firm and requested and
7 required to provide information sufficient to allow the law
8 firm to protect its client. In this case, the identity of that
9 client was in complete shroud, in large part because --

10 THE COURT: We can call back the agent maybe to settle
11 that minor point. The point I am still unclear of, the more
12 major consequence potentially, at least, is what evidence is
13 there in the record that Mr. Newkirk was being threatened with
14 being sued individually? I don't know that there is anything
15 presently in the record, but there might be. Ms. Chaudhry
16 remembers at least one answer the witness gave. Her other
17 point is, well, there might be something in the documents.
18 According to the government, there is nothing like that in the
19 documents, true?

20 MR. ADAMS: True. And all the documents I have,
21 Ms. Chaudhry has.

22 THE COURT: I am willing just to complete the record
23 tonight, so we don't have to continue this, to do two things.
24 First, call one or both agents for the extremely limited
25 purpose of asking whether they recollect whether anyone said,

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Deal - Cross

1 We want to cooperate -- whether Ms. Buchanan, Mr. Campriello
2 said, in the presence of Mr. Newkirk, we want to cooperate
3 fully, and I will allow cross-examination but limited to that;
4 and then if you want to recall Mr. Newkirk on this question of
5 what he remembers about being told, if he does, that he was
6 going to be potentially sued, I will allow that. So why don't
7 we do that right now, and then we will turn to the subpoena.
8 You don't have to call them both. If you know one or the other
9 is prepared or has a recollection on this, that would be fine.

10 MR. ADAMS: One moment, your Honor. I am going to
11 recall Agent Deal.

12 THE COURT: Okay.

13 PAUL DEAL, previously sworn.

14 THE COURT: So the court reminds the witness he is
15 still under oath, and aren't you foolish for not leaving
16 sooner.

17 On the meeting of February 12, was Mr. Newkirk there
18 when you first began?

19 THE WITNESS: No, your Honor.

20 THE COURT: Starting with the point when he is in the
21 room, was any statement made by any of the people from Bryan
22 Cave as to what their intentions were?

23 THE WITNESS: The only statement that was made was by
24 Ms. Buchanan that she was there to protect the attorney/client
25 privilege.

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Deal - Cross

1 THE COURT: So was there any -- let me put a more
2 pointed question. Was there any statement ever made in
3 Mr. Newkirk's presence at this meeting that, We want to
4 cooperate fully, subject only to protecting attorney/client
5 privilege or anything like that?

6 THE WITNESS: They may have made a statement about
7 they wanted to cooperate, but it was a general cooperation
8 statement. As I recall, I think that statement was made
9 actually.

10 THE COURT: Have you ever, in fact, had a witness
11 similarly situated to a law firm that hasn't said that? That's
12 a rhetorical question. You don't have to answer that.

13 All right. Cross-examination.

14 CROSS EXAMINATION

15 BY MS. CHAUDHRY:

16 Q. Agent Deal, you took notes of that meeting, correct?

17 A. I did.

18 Q. In those notes you did not list the people who were
19 present, did you?

20 A. I did not.

21 Q. And you did not list that -- you do not state in your notes
22 that it was stated in Mr. Newkirk's presence that the firm was
23 cooperating, correct?

24 A. No. As I said, I began taking notes once I began
25 questioning. The answer to your question is no.

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Newkirk - Redirect

1 Q. Weren't most of your conversations about cooperating on the
2 phone before the meeting?

3 A. No. I would actually say the initial phone call set up the
4 meeting, and then the conversations about cooperation occurred
5 prior to Mr. Newkirk arriving to the room.

6 THE COURT: So I ask you, again, just so we are
7 crystal clear, was there any statement made about that after he
8 entered the room about cooperating?

9 THE WITNESS: Your Honor, I cannot recall exactly when
10 the cooperation statement was made.

11 THE COURT: So you don't know one way or the other.

12 THE WITNESS: No, your Honor.

13 THE COURT: Very good. Anything else?

14 MR. ADAMS: No, your Honor.

15 THE COURT: Thank you so much. Now you can really get
16 out of here.

17 Did you want to recall Mr. Newkirk?

18 MS. CHAUDHRY: Yes, please.

19 THE COURT: Let's get Mr. Newkirk back on the stand.

20 The court reminds the witness he is still under oath.

21 HARVEY NEWKIRK, previously sworn.

22 THE COURT: Go ahead, counsel.

23 MS. CHAUDHRY: Thank you, your Honor.

24 REDIRECT EXAMINATION

25 BY MS. CHAUDHRY:

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Newkirk - Redirect

1 Q. Mr. Newkirk, at any point prior to February 12, 2014, did
2 you have conversations with Bryan Cave about the potential of
3 you being named in a lawsuit connected to the Maxim deal?

4 A. Yes.

5 THE COURT: Who did you have those conversations with?

6 THE WITNESS: Vincent Alfieri.

7 THE COURT: And how did that come about?

8 THE WITNESS: It came about in two ways. One was
9 conversations that he and I both had separately with Mark
10 Weinberg, and then also in discussions that he and I had
11 jointly with Noah Weissman and Jay Dorman, who are partners at
12 the firm.

13 THE COURT: Did you ask him anything about whether,
14 for example, you were covered by insurance?

15 THE WITNESS: No.

16 THE COURT: Did you ask him anything about what they
17 thought your liability could be?

18 THE WITNESS: Generally we just talked about the firm,
19 myself being named. Not specifically.

20 THE COURT: These conversations were when
21 chronologically?

22 THE WITNESS: They would have been after mid November,
23 somewhere, mid November and January.

24 THE COURT: All right. Anything else?

25 MS. CHAUDHRY: Nothing further.

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Newkirk - Recross

1 THE COURT: Cross-examination.

2 RECROSS EXAMINATION

3 BY MR. ADAMS:

4 Q. Would you agree that your affidavit says nothing about any
5 statements made to anybody at Bryan Cave prior to February 12,
6 2014?

7 A. I would have to look at it.

8 MR. ADAMS: May I approach your Honor?

9 THE COURT: I am assuming that's the case, but let him
10 look at it.

11 THE WITNESS: That's correct.

12 Q. Mr. Newkirk, prior to the filing of your reply memorandum
13 in connection with this motion, did you review that document?

14 A. My affidavit?

15 Q. No, sir, the reply memorandum.

16 A. You are saying prior to -- can you show it to me so I can
17 see?

18 (Pause)

19 A. I discussed it. I didn't read it prior to its filing.

20 Q. Are you aware, sir, that on page three of your reply
21 memorandum you note that -- you define the existence of an
22 attorney/client relationship as beginning on February 12, 2014?

23 A. No, I'm not aware of it.

24 Q. When did you receive the government's 3500 material in
25 connection with this hearing?

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1 A. Within the last 48 hours.

2 Q. And did you review it before coming in today?

3 A. Yes.

4 MR. ADAMS: No further questions, your Honor.

5 THE COURT: Anything else from defense counsel?

6 MS. CHAUDHRY: Nothing further, your Honor.

7 THE COURT: You may step down.

8 (Witness excused)

9 THE COURT: Let me ask defense counsel, aren't you
10 bound by the representation made in your reply memorandum at
11 page 3?

12 For the record, it states, "The government then argues
13 that the vast majority of materials produced by Bryan Cave to
14 the government and then to Newkirk predate the existence of an
15 attorney/client relationship, *i.e.*, February 12, 2014, or are
16 otherwise not privileged and, thus, should not be suppressed.
17 This does not address the exclusion prong of Newkirk's motion.
18 To reiterate what we state in our original motion papers,
19 Newkirk seeks the exclusion of his statements to the government
20 and Bryan Cave because he made those statements believing that
21 Bryan Cave represented him. To the extent that Bryan Cave has
22 turned over documents that predate the relationship or are
23 otherwise nonprivileged, then of course Newkirk does not seek
24 their exclusion."

25 Similarly, on the next page of the reply memorandum,

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1 it states as follows: "The government also argues that it was
2 entitled to redacted notes from interviews of Bryan Cave
3 attorneys because 'most of the information reflected in those
4 notes, which will be produced as appropriate and in due course
5 as 3500 material, relates to statements made by Bryan Cave
6 personnel regarding events predating February 12, 2014.'
7 However, if, as we argue, there was a *bona fide* attorney/client
8 relationship between Newkirk and Bryan Cave, then the
9 statements of Bryan Cave attorneys, even those relating to
10 pre-February 12, 2014, events, would necessarily be informed by
11 their privileged conversations with Newkirk, unlike, for
12 example, documents predating February 12, 2014, between third
13 parties, clearly not in an attorney/client relationship, the
14 recollections of Bryan Cave attorneys who have had privileged
15 conversations with Newkirk cannot be distilled out from those
16 privileged conversations."

17 So the assertion there being made twice, albeit not
18 with total clarity, is that the defense accepts that the
19 attorney/client relationship began on February 12, but says
20 with respect to the notes that still they should be suppressed
21 because they are part of an inextricably intertwined statement
22 with those that arose after the February 12. So where in the
23 defense submissions of any kind is there a statement that the
24 attorney/client privilege arose prior to February 12?

25 MS. CHAUDHRY: Your Honor, with the court's

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1 permission, Mr. Keneally would like to address that.

2 THE COURT: Sure, but I need an answer to my question.

3 MR. KENEALLY: Of course, your Honor. Thank you. And
4 the answer to that, your Honor, is that our submission on the
5 motion addressed, admittedly, strictly speaking the criminal
6 aspect of the attorney/client relationship which, we submitted,
7 if it would have begun, would have begun on February 12. So
8 these arguments that we are making here don't deal with
9 Mr. Newkirk's testimony today that there was a civil
10 relationship that predated the 12th of February.

11 THE COURT: Why isn't that argument now waived? You
12 can't come into court on the day of the evidentiary hearing,
13 having taken a totally different position up to then in your
14 papers and in your motion and say, well, I guess we lost on
15 that, but we got another prong to our argument because of
16 something our client said today on his testimony. I think that
17 is long since waived. So I will deny the motion in its
18 entirety.

19 Now let's talk about the subpoena. As I understand
20 it, this is a subpoena that has been served on Bryan Cave. Do
21 you have a copy of that subpoena?. I have it. It is an
22 attachment to the memorandum of the defendant. It has four
23 categories. If there are objections to the subpoena, with very
24 limited exceptions, they can only be raised by Bryan Cave. The
25 government does probably have standing to make the argument

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1 that, if I recall correctly, it made in its papers that some of
2 this constitutes 3500 material. I think that argument in this
3 context is totally unpersuasive. So what? There is nothing in
4 section 3500 that precludes a defendant from obtaining
5 information from a third party, and the mere fact that it
6 happens to constitute 3500 material is neither here nor there.

7 But let me hear from counsel for Bryan Cave, who has
8 been waiting for this moment.

9 MR. SILVERMAN: Here is my moment. Hope to do better
10 than the last time I spoke in this court a few hours ago.

11 THE COURT: Stop rubbing it in.

12 MR. SILVERMAN: Your Honor, first, as matter of
13 procedure, there is no subpoena that's been served. Defendants
14 made a motion for permission to serve a subpoena.

15 THE COURT: I see. Forgive me.

16 MR. SILVERMAN: And the government has opposed the
17 primary ground for the motion.

18 THE COURT: So the government does have standing in
19 that sense. You are right to remind me of that procedural --

20 MR. SILVERMAN: We have not been served with a
21 subpoena, and we have not put in any papers because --

22 THE COURT: So assuming I were to approve the
23 subpoena, does Bryan Cave have any objections?

24 MR. SILVERMAN: Yes, your Honor. I think it can be
25 fairly simple. I think there are a number of arguments we

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1 could make, which I think I don't need to because this is the
2 simple fact. The subpoena overlaps completely the subpoena
3 that was served by the United States in August of 2014, and the
4 United States has told us, and they have said it in open court
5 today, that what we have provided to them they have provided to
6 defense counsel. So defense counsel --

7 THE COURT: I think they said that as to e-mails. I
8 am not sure I heard them say it across the board. In fact, I
9 know that there is at least some material that they have
10 redacted as 3500 material.

11 MR. SILVERMAN: Your Honor, I believe what they
12 redacted -- and I could be corrected -- is parts of their
13 notes.

14 THE COURT: Their own notes.

15 MR. SILVERMAN: Nothing, to my knowledge, of Bryan
16 Cave. I would ask Mr. Adams if that is correct.

17 THE COURT: That's fine. Let's just make sure,
18 because I agree this could short circuit it.

19 Have you in fact turned over to the defense everything
20 called for by this subpoena that they wish to serve on Bryan
21 Cave?

22 MR. ADAMS: With the exception of one item that I
23 received yesterday, yes, and I will be producing that
24 forthwith.

25 MR. SILVERMAN: And let me explain to the court why

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1 there have been a few documents that have been produced
2 recently, and the explanation is this: My firm was not
3 involved and did not represent Bryan Cave back in the summer of
4 2014. We have been retained more recently. We were asked by
5 Bryan Cave to review their document production to make sure it
6 was complete. We have done that and have been doing that.

7 As is unfortunately often the case, we found there
8 were some documents that should have been produced that were
9 not produced. I personally went through those documents, and
10 there was some question of was another copy of this document
11 produced, and we have been checking that, but I wanted to see
12 if there were any documents that related to the events of this
13 hearing, specifically the February meetings between Mr. Newkirk
14 and Bryan Cave and the correspondence with Alston & Bird which
15 is relevant to this hearing.

16 To the extent we found a number of e-mails, and we
17 did -- I think it was something like eight more e-mail
18 chains -- we immediately produced them to the government, and
19 my understanding is the government immediately produced them to
20 the defendants. There are I think it is under 100 other
21 documents that we will be producing by next week that should
22 have been produced that weren't produced. By memory, some of
23 them were e-mails between the government and Bryan Cave about
24 things that you have heard about today. Some were just some
25 deal documents, you know, just relating to the Maxim deal that

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1 say, Attached is a draft of the this or the that. So I wish I
2 could have come up here to say, your Honor, we have produced
3 absolutely everything to the government and absolutely
4 everything the government has produced to the defendant. I can
5 say that next week we are working real hard to make sure that
6 happens.

7 And I guess the other point is, there are some Bryan
8 Cave privileged documents. You have heard about Bryan Cave
9 general counsel, associate general counsel and threats and so
10 forth, so we have withheld from the production the Bryan Cave
11 privileged documents between Bryan Cave lawyers and the general
12 counsel and associate general counsel who were representing the
13 firm.

14 THE COURT: All right. So let me then ask the
15 government, is it your representation that, in addition to what
16 you have already turned over, when you get whatever additional
17 documents from Bryan Cave that Mr. Silverman just referred to,
18 that you will promptly turn them over to the defense as well?

19 MR. ADAMS: It is, your Honor.

20 THE COURT: So now I ask, and I am sorry, by the way,
21 did I misspeak, because the government does have full standing
22 since this was a 17(c) motion, but let me go to the defense.
23 So the representation is not only that you are getting
24 everything, but that independent counsel from Paul Weiss, at a
25 fee that is probably astronomical, is double checking and that

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1 you are going to get everything else that will be turned over.

2 So what do you need the subpoena for?

3 MS. CHAUDHRY: We weren't aware that that was the
4 situation.

5 THE COURT: That's fine, and no reason you should have
6 been. But I assume that you now withdraw the motion without
7 prejudice to remaking it if it turns out that there is
8 something that's been inadvertently not produced or something
9 like that.

10 MS. CHAUDHRY: Yes, on the representation of the
11 government that, as they get a rolling production, it will roll
12 to us.

13 THE COURT: Yes, that's the representation they made
14 and that's enforceable by the court, of course.

15 All right. Well, it's been fun, but anything else we
16 need to take up tonight?

17 MR. ADAMS: Nothing from the government.

18 MS. CHAUDHRY: No, thank you, your Honor.

19 THE COURT: Thanks very much.

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